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No. 00-456

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State court's refusal to apply or even recognize the preclusive effect of a Federal court's findings of fact related to an identical issue of whether a "taking" occurred constitutes a violation of the "Full Faith and Credit Clause," the "Supremacy Clause" of the United States Constitution and/or the federal "Full Faith and Credit" statute.

LIST OF ALL PARTIES

PURSUANT TO RULE 21.1(B)

The undersigned counsel of record for the State of Louisiana, Department of Natural Resources, Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

I State of Louisiana;
2. Louisiana Department of Natural Resources;
3. Keith J. Asevado;
4. Albert J. Avenal, Jr.;
5. Chris P. Barthelemy;
6. Gary Barthelemy;
7. Kendall M. Barthelemy;
8. Neal Beshel;
9. Anna Butscher Buras;
10. Anna Bessie Bodden Buras;
11. Neal Buras;
12. Ralph J. Buras, Jr.;
13. Ralph J. Buras, Sr.;
14. Richard Buras;
15. Donald J. Campo, III;
16. Donald J. Campo, Jr.;
17. Donald J. Campo, Sr.;
18. Donald J. Campo;
19. Ernest J. Campo;
20. Mathilda Guerra Campo;
21. Peggy Campo;
22. Pero B. Cibilic;
23. Anna Cibilich;

24. Domenica Cibilich;
25. Richard H. Clark, Sr.;
26. Clear Water Oysters, Inc.;
27. Crescent Oysters, Inc.;
28. Irvin Cross;
29. Melvin Cross;
30. Sedonia Cross;
31. Luka Cutura;
32. Theresa A. Dauzart;
33. Clarence R. Duplessis;
34. Clarence R. Duplessis, Jr.;
35. Leona Duplessis;
36. Byron Encalade;
37. Carliss J. Encalade;
38. Leon M. Encalade;
39. Nathaniel Encalade as representative for the Estate of Joseph Encalade;
40. Stanley Encalade;
41. M.J. Farac, Jr.;
42. M.J. Farac, Sr.;
43. Maja B. Farac;
44. Sinajka Farac;
45. Daniel R. Fernandez;
46. Raymond Fernandez, Jr.;
47. Raymond Fernandez, Sr.;
48. Fox Oyster Company, Inc.;
49. Fox Industries, Inc.;
50. Fox Seafood, Inc.;
51. Ann P. Fox;
52. Calvin R. Fox, Jr.;
53. Dale E. Fox;
54. Gene L. Fox;

55. Justin Ryan Fox;
56. Kenneth A. Fox;
57. Kenneth Ryan Fox;
58. Marie 0. Fox;
59. Rodney L. Fox;
60. Rodney L. Fox, Jr.;
61. Ross Louis Fox
62. Estate of M.J. Franicevich;
63. Rene Ganer;
64. Gulf Quality Inc.;
65. Michael Guttuso;
66. Abraham J. Harness;
67. Morris Harvey;
68. Nathan G. Harvey;
69. Howard Hingle;
70. Laurie Duplessis Holiday;
71. Herman Isadore, Jr.;
72. J & P Oysters, Inc.;
73. Estate of Mayo P. Jones, Jr.;
74. Robert M. Keenan;
75. Donald J. Kennair, 111;
76. Donald J. Kennair, Jr.;
77. Ralph James Kieff, Jr.;
78. Ralph James Kieff, Sr.;
79. Joseph Labruzzo;
80. Rachel Fox Labruzzo;
81. Joey G. Latapie;
82. Clifford Lebouef,
83. Jean Lebouef;
84. Lorne Lebouef,
85. Irwin H. Lefebvre, Jr.;
86. Ante Lepetich;

87. Mato Lepetich;
88. John Martinez, Jr.;
89. John Martinez, Sr.;
90. Marty A. Melerine, Jr.;
91. Matthew David Meyers;
92. Mitchell Meyers;
93. Rhonda Fox Meyers;
94. Allan C. Molero, Jr.;
95. Janet Molero;
96. Elenora Robin Mook;
97. Cladmon Narcisse;
98. Felix Narcisse;
99. Oliver B. Narcisse, Sr.;
100. Nicolae Nitica;
101. Oyster Fisheries, Inc.;
102. Curt Pannagl;
103. Patti L. Pannagl;
104. Richard Patterson;
105. Pean Inc.;
106. Josip Piacun;
107. Marinko Piacun;
108. Pasko Piacun;
109. J. Piacun Company, Inc.
110. Anton N. Popich;
111. Ivo, N. Popich;
112. Port Sulphur Fisheries, Inc.;
113. Domingo Rano;
114. Arthur Reddick;
115. Arthur A. Reddick, Jr.;
116. Kevin Joseph Reddick;
117. John Dwight Riley;
118. Van Robin;

119. Adam R. Serigne;
120. Lionel R. Serigne, Sr.;
121. O'Neil N. Serigne;
122. Phillip H. Simmons, Jr.;
123. Helen Tesvich Skansi;
124. Nick L. Skansi;
125. Estate of Frank S. Slavich, Sr.;
126. Frank S. Slavich, Jr.;
127. Taco, Inc.;
128. John Taliancich;
129. Ann S. Tesvich;
130. Estate of Kuzma J. Tesvich;
131. Frances Lynn Tesvich;
132. Tinson Seafood Company;
133. Tesvich Oysters Inc.;
134. Ivo Tesvich;
135. Jane P. Tesvich;
136. John A. Tesvich;
137. Judi Tesvich;
138. Kuzma I. Tesvich;
139. Lisa K. Tesvich;
140. Maria J. Tesvich;
141. Nedo Tesvich;
142. Peter J. Tesvich;
143. Peter Luke Tesvich;
144. Charlie Thompson;
145. Steve Thompson;
146. Nikola Vekic;
147. Robert White;
148. Austin Yawn;
149. Nikola Zarak.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES PURSUANT TO RULE 2 1.1 (B).....ii

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES ix

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS/CONSTITUTIONAL ARTICLES INVOLVED 3

STATEMENT OF THE CASE 4

A. Summary 4

B. Plaintiffs' Allegations in the Parallel Federal and State Proceedings.....7

C. Proceedings Below 8

REASONS FOR GRANTING THE PETITION.....11

1) The Fourth Circuit's Opinion Presents a Direct Conflict with Applicable Federal Law as Regards the Preclusive Effect of a Prior Federal Decision In Subsequent State Court Proceedings 11

2) The Lower Court's Decision Also Conflicts With Applicable State Law.....11

3) The Question Presented Has Serious Public Policy Considerations 11

ARGUMENT 11

I. The Lower State Courts' Decisions Present a Direct Conflict with Federal Law 11

II. The Lower State Courts' Decisions Conflict With Decisions of Other States 13

III. Application of the Federal Common Law of Collateral Estoppel Results In The Dismissal of Plaintiffs' Claims 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page**

Abrams v. Morial
968 F.Supp. 1106 (E.D. La. 1997).....13

Aerojet-General Corp. v. Askew
511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S 908 (1975).....13

Allen v. McCurry
449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).....12

Anderson v. Phoenix Investment Council of Boston
440 N.E.2d 1164 (Mass. 1982) 12

Avenal v. United States
100 F.3d 933 (1995).....1,6,17

Avenal v. United States
33 Fed.Cl. 778 (1995).....1,16

Bernhard v. Bank ofAmerica Nat. Trust & Savings Assn.
122 P.2d 892 (Cal. 1942).....16

Chemtron Corp. v. Business Funds, Inc.
682 F.2d 1149 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, *cert. denied*, 406 U.S. 1013 (1983) 13

Commercial Box & Lumber Co. v. Uniroyal, Inc
623 F.2d 371 (5th Cir. 1980) 13

Copeland v. Merrill Lynch & Co.
47 F.3d 1415 (5th Cir. 1995) 15

Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.
120 U.S. 141, 7 S.Ct. 482 (1887) 12

Cromwell v. County of Sac
94 U.S. 351, 24 L.Ed. 195 (1876).....12

Embry v. Palmer
107 U.S. 3, 2 S.Ct. 25 (1872).....12

Exhibitors Poster Exch., Inc. v. National Screen S. C.
517 F.2d 110 (5th Cir. 1975) 16

FDIC v. Lee
942 F.Supp. 255 (E.D. La. 1995).....13

Heck v. Humphrey
512 U.S. 475, 114 S.Ct. 2364 (1994).....12

Jeanes v. Henderson
688 S.W.2d 100 (Tex. 1985), *rehearing of cause overruled* (May 1, 1985).....11

Kremer v. Chemical Construction Corp.
456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).....12

Magnolia Petroleum Company v. Hunt
320 U.S. 430, 64. S.Ct. 208 (1943).....12

McNeal v. Paine Webber Jackson & Curtis
293 S.E.2d 331 (Ga. 1982) 14

Nagle v. Lee
807 F.2d 435 (5th Cir. 1987).....13

Parklane Hosiery Co., Inc. v. Shore
439 U.S. 322, 99 S.Ct. 649 (1979).....16

Penn Central Transportation Co. v. City of New York
438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631
(1978).....6,12

Pilie & Pilie v. Metz
547 So.2d 1305 (La. 1989) 13

Recoveredge L.P. v. Pentecost
44 F.3d 1284 (5th Cir. 1995) 13

Reeder v. Succession of Palmer
623 So.2d 1268 (La. 1993) 12

Rennie v. Freeway Transport
656 P.2d 919 (Or. 1982).....14

Stoll v. Gottlieb
305 U.S. 165, 59 S.Ct. 134 (1938).....12

Stone v. Entergy Services, Inc.
99-0236*3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141, *writ denied*, 99-2719 (La. 11/24/99), 750 So.2d 989 14

Stovall v. Price Waterhouse Co.
652 F.2d 537 (5th Cir. 1981) 13

Articles of the Constitution **Page**

U.S.C.A. Const. Art. IV, § 1 .....i,3,11

U.S.C.A. Const. Art. Vl § 2 .....i,3,11

U.S.C.A. Const. Art. V 5,7

Article 1, Section 4 of the Louisiana Constitution of 1974 4,8

Statutes and Rules

28 U.S.C. § 1257 2

28 U.S.C. § 1738 .....i,3,12

U.S. Supreme Court Rule 10 2

Miscellaneous Texts and References

C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, Jurisdiction Section 4468 (1981) 14

Restatement (2d) of Judgments Section 87 (1982) 13,14

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Louisiana, Department of Natural Resources, respectfully petitions this Court to issue a writ of certiorari to review the Judgment of the Louisiana Court of Appeal for the Fourth Circuit on rehearing entered in, "Albert J. Avenal, Jr., et at v. The State of Louisiana and the Department of Natural Resources," bearing Civil Action No. 99-C-0127, upon which the Supreme Court of Louisiana in, "Albert J. Avenal, Jr., et at v. The State of Louisiana and the Department of Natural Resources," bearing Civil Action No. 00-CC-1077, has declined to exercise its discretionary, supervisory jurisdiction. The State Fourth Circuit initially dismissed the Plaintiffs' claims, just as the Federal Circuit had dismissed these same Plaintiffs' claims in a parallel proceeding. The Fourth Circuit applied the federal law of collateral estoppel, and, in turn recognized the preclusive effects of the prior federal judgment. In the subsequent decision of the divided 3-2 panel of the Fourth Circuit, on rehearing, the Fourth Circuit completely reversed itself and would not give full faith and credit to, nor recognize the preclusive effect of, the prior federal decision which had dismissed the Plaintiffs' claims in their entirety on the basis that there simply was no "taking" in a constitutional sense.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit (App. E, infra, A-46 through A-57) is reported at 100 F.3d 933 (Fed. Cir. 1996).

The Opinion of the United States Court of Federal Claims is reported at 33 Fed.Cl. 778 (1995). (App. F, infra, A-58 through A-90).

The decision of the Supreme Court of Louisiana to decline review of the lower courts' decisions in this case (App. D, infra, A-45) is unreported.

The decision of the Louisiana Court of Appeal for the Fourth Circuit on rehearing (App. A, infra, A-1 through A-18) is reported at 2000 WL 320460, 99-0127 (La.App. 4th Cir. 3/15/00).

The decision of the original five judge panel of the Louisiana Court of Appeal for the Fourth Circuit (App. C, infra, A-25 through A-44) is reported at 757 So.2d 1, 99-0127 (La.App. 4th Cir. 3/3/99).

The Judgment of the District Court (App. B, infra, A- 19 through A-24) is unreported.

JURISDICTION

The Supreme Court of Louisiana declined to exercise its discretionary review on June 23, 2000 (App. D, infra, A-45). The decision of the Louisiana Court of Appeal for the Fourth Circuit, on rehearing for which review is sought, was entered on March 15, 2000. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257 and Rule 10 of this Court, in that the lower state courts have decided an important federal question in a way that conflicts directly with the decisions of this Court, the federal courts of appeals and the highest courts and lower appellate courts of the other states.

STATUTORY PROVISION/CONSTITUTIONAL ARTICLES INVOLVED

The "Supremacy Clause", Article VI, Section 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The "Full Faith and Credit Clause", Article IV, Section 1 of the Constitution of the United States provides:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The federal "Full Faith and Credit Statute", 28 U.S.C. 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof,

shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. Summary

Albert J. Avenal, Jr. and certain other oyster leaseholders/fishermen filed a class action against the State of Louisiana, Department of Natural Resources ("DNR") in the 25th Judicial District Court for the Parish of Plaquemines on March 29, 1994 on behalf of all persons holding oyster leases on Louisiana state water bottoms within Breton Sound, an estuary in Southeastern Louisiana. These Plaintiffs alleged that a taking "had occurred" without "just compensation" in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 4, of the Louisiana

Constitution because their oyster leases were adversely affected by the freshwater outflow ftom the Caernarvon freshwater diversion structure located on the east bank of the Mississippi River in Plaquemines Parish. The trial court certified and defined the class of Plaintiffs.

Meanwhile, on April 26, 1994, Albert Avenal and these same representative Plaintiffs had also filed suit in the U.S. Court of Federal Claims[1] against the United States, i . e., the United States Army Corps of Engineers, which had designed, financed and built the Caernarvon structure. In that suit, these same Plaintiffs alleged a taking under the Fifth Amendment of the U.S. Constitution, the very issue raised in the state court proceeding.

The United States subsequently moved for summary judgment on several grounds, all related to the takings issue. One of these theories was that the Plaintiffs had no reasonable investment backed expectations in their oyster leases since they had decades of prior notice of the planning and construction of the project. Another was that the Plaintiffs had no compensable property interest in the continued, artificially elevated salinity conditions caused by the Mississippi River levee system, which, in turn, allowed for oysters to grow in historically fresh areas within Breton Sound. On August 2, 1995, the Court of Federal Claims granted summary judgment, concluding that the Plaintiffs had no compensable expectancy in the continued artificially elevated salinity levels in historically freshwater marsh areas in Breton Sound, areas which

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[1] Albert J. Avenal, Jr. et al. v. The United States of America", United States Court of Federal Claims, No. 94-26 1 -L.

were and are the subject of the instant litigation.

On November 12, 1996, the U.S. Court of Appeals for the Federal Circuit affirmed the lower court's judgment, but on different grounds[2] . The court held that these same oyster lessees could not have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversions of the state and federal governments.[3] In doing so, it restated and confirmed the federal position regarding takings law as set out by this Court.[4]

The court concluded by stating:

> In light of the history of events in this case, plaintiffs, as a matter of law must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.[5]

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2 Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

3 Id. at 937.

4 The Federal Circuit based its holding on Penn Central Transportation Co. v. City of New York, 438 U. S. 104, 98. S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

5 Avenal, 100 F.3d at 937.

B. Plaintiffs' Allegations in the Parallel Federal and State Proceedings

A comparison of the allegations set forth in the Plaintiffs' Federal Complaint and the Plaintiffs' Petition filed in the 25th Judicial District Court reveals that the cases deal with the identical factual issue: Whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure. More specifically, paragraph 7 of the federal Complaint and paragraph VIII of the state Petition alleged that the federal and state "actions," i.e., the diversion of freshwater from the Mississippi River to nourish, restore and refresh the State's wetlands, results in a taking. The Federal Complaint states as follows:

7.

> The hereinabove described actions of defendant have resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[6]

The Plaintiffs' State Court Petition states as follows:

VIII.

> As a direct result of the herein above described action of defendants, the productivity of plaintiffs'

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6 See App. J, infra, A-94 through A-104.

> leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[7]

With the exception of the identity of the named governmental defendant, the Petition filed in the 25th Judicial District Court is virtually indistinguishable from the Complaint filed in federal court. Although the names of the defendants are changed, the issue remains identical-whether a taking has occurred as a result of the operation of the Caernarvon freshwater diversion structure.

C. Proceedings Below

In accordance with the State trial court's pre-trial scheduling order, on December 15, 1998, DNR filed several motions for summary judgment, including one based on the issue of collateral estoppel. DNR asserted that the preclusive effect of the prior federal decision dismissing Plaintiffs' claims on summary judgment was an issue of federal law and required that the state court proceedings likewise be dismissed based upon federal common law, specifically collateral estoppel. The Honorable William A. Roe denied DNR's Motion from the bench on January 5, 1999.[8]

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[7] See App. K, infra, A-105 through A- 114.

[8] See App. B, infra, A-19 through A-24.

From that adverse decision, DNR filed an application for supervisory writs in the Louisiana Court of Appeal for the Fourth Circuit seeking to invoke that Court's discretionary supervisory jurisdiction. DNR's writ application was filed January 15, 1999, and the issues were fully briefed by both parties. On March 3, 1999, a five judge panel of the Fourth Circuit issued a 3-2 decision, reversing the Trial Court and granting DNR's Motion, thereby dismissing Plaintiffs' claims in their entirety. The Court based its ruling on the fact that the preclusive effect of a prior federal decision is an issue of federal law, and therefore applied federal law of collateral estoppel to decide the issue. On March 17, 1999 Plaintiffs filed an application for rehearing and/or rehearing *en banc*. The Fourth Circuit granted a writ of certiorari to review the entire twenty (20) volume record, presumably to determine whether the federal issues in both cases were the same, according to Judge Miriam Waltzer, the author of the original opinion.[9]

On March 15, 2000 the same five judge panel issued another 3-2 decision, this time reversing their prior decision and affirming the lower court's dismissal of the Motion for Summary Judgment. The Fourth Circuit ruled that collateral estoppel, whether based upon federal common law or any other source of law, would simply not apply in Louisiana. This element of the decision presented for the first time the issues which are the subject of this Petition.

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[9] See App. A, infra, A-15, dissent of Judge Waltzer.

Significantly, Judge Waltzer observed in her dissent, issued with the decision on rehearing, that the majority of the panel had issued a decision which conflicted directly with entrenched federal and state law on the issue, not to mention specific constitutional authority:

> In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. (Citations omitted.)[10]

The issue thus framed by Judge Waltzer presents the specific constitutional conflict that forms the basis for the Petition. It should be noted that the Court also concluded that this Court's reasonable investment-backed expectations test for a taking would never be used in Louisiana, deeming it "irrelevant."[11]

On April 14, 2000, DNR filed an application for supervisory writs with the Supreme Court of Louisiana, seeking to have that Court exercise its discretionary, supervisory jurisdiction. This application was denied on June.23, 2000. From these adverse decisions below, DNR seeks to invoke this Court's jurisdiction. In essence, Petitioner seeks to have the original decision of the Louisiana Court of Appeal for the Fourth Circuit reinstated, terminating the state litigation in line with the termination of the federal litigation.

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10 See App. A, infra, A-15, dissent of Judge Waltzer.

11 See App. A, infra, A-10.

REASONS FOR GRANTING THE PETITION

1) The Fourth Circuit's Opinion presents a direct conflict with applicable federal law as regards the preclusive effect of a prior federal decision in subsequent state court proceedings.

2) The Lower Court's decision also conflicts with applicable State law, including not only the law of Louisiana but also that of other states, on the same issue.

3) The question presented has serious public policy considerations in that a precedent has been set for federal factual findings to be relitigated in state courts. This will in turn generate piecemeal litigation and inconsistent findings on the state and federal levels, in direct contravention of the Supremacy Clause, the Full Faith and Credit Clause and the Full Faith and Credit Statute.

ARGUMENT

1. The Lower State Courts' Decisions Present a Direct Conflict with Federal Law.

The preclusive effect of a prior federal decision emanates from the United States Constitution's "Supremacy Clause"[12] and "Full Faith and Credit Clause",[13] as well as

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[12]Article VI, Section 2.

[13]Article IV, Section 1.

the federal "Full Faith and Credit Statute",[14] all of which require each state to give the same effect to the judgments of federal courts as those judgments have in the jurisdictions where rendered.[15]

The doctrines of *res judicata* and collateral estoppel are most important in assuring that judgments are conclusive, thus avoiding re-litigation of issues that were or could have been raised in the original action (*res judicata*) and of questions of law or fact necessary to the judgment in the original action (collateral estoppel).[16] The two doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." [17]

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14 28 U.S.C. § 1738.

15 Heck v. Humphrey, 512 U.S. 475, 488 n. 9, 114 S.Ct. 2364, 2373 n. 9 (1994); Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 437-438, 64 S.Ct. 208, 212- 213 (1943); Stoll v. Gottlieb, 305 U.S. 165, 167 - 171, 59 S.Ct. 134, 135 - 138 (1938); Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U.S. 141, 160, 7 S.Ct. 482, 474 (1887); Embry v. Palmer, 107 U.S. 3, 9 - 10, 2 S.Ct. 25, 27 - 30 (1872).

16 Kremer v. Chemical Construction Co., 456 U.S. 461, 102 S.Ct. 1883, 1889 n. 5, 72 L.Ed.2d 262 (1982); Cromwell v. Count of Sac, 94 U.S. 351, 24 L.Ed. 195 (1876).

17 Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

When a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the federal law of *res judicata* which must be examined.[18] The federal rule of preclusion governs any federal judgment, even when the Court renders a decision on state law issues.[19] Further, the preclusive effect of a prior federal decision is not limited to the doctrine of *res judicata* and extends to collateral estoppel as well.[20]

II. The Lower State Courts' Decisions Conflict with Decisions of Other States.

The Courts of the States that have addressed this issue have likewise concluded that when a State court is required to determine the preclusive effects of a judgment rendered by a Federal court exercising federal question jurisdiction, it is the federal law of *res judicata*

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18 Nagle v. Lee, 807 F.2d 435, 439 (5th Cir. 1987); Chemtron Corp. v. Business Funds, Inc., 682 F..2d 1149, 1188 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007, cert denied, 406 U.S. 1013 (1983); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540-41 (5th Cir. 1981); Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980); Aerojet-General Corp. v. Askew, 511 F.2d 710, 715 (5th Cir.), cert. denied, 423 U.S. 908, (1975); Restatement (2d) of Judgments - Section 87 (1982).

19 Recoveredge L.P. v. Pentecost, 44 F.3d 1284, 1290 n. 11 (5th Cir. 1995).

20 Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1422 (5th Cir. 1995); FDIC v. Lee, 942 F.Supp. 255, 257 (E.D. La. 1995); Abrams v. Morial, 968 F.Supp. 1106, 1109 (E.D. La. 1997).

that must be applied.[21] Louisiana Courts, until this matter, have observed "the principle that a State court must apply federal law in deciding upon at least the central core of *res judicata* effects of any Federal court judgment is immanent within the Constitution and laws establishing our federal system."[22] The Fourth Circuit's refusal to apply the federal rule of collateral estoppel also conflicts with a decision issued by the very same court.[23] Accordingly, the lower Courts' decisions in this matter present a direct conflict not only with applicable federal law, but also applicable state law, even that of Louisiana.

111. Application of the Federal Common Law of Collateral Estoppel Results in the Dismissal of Plaintiffs' Claims.

The federal law of collateral estoppel, which the trial court is required to apply, consists of four elements:

(1) The issue at stake must be identical to the one involved in the prior action;

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21 See, e.g., McNeal v. Paine Webber Jackson & Curtis, 332 (Ga. 1982); Anderson v. Phoenix Investment Council of Boston, 293 S.E.2d 440 N.E.2d 1164, 1167 (Mass. 1982); Rennie v. Freeway Transport, 656 P.2d 919, 921 (Or. 1982); Jeanes v. Henderson, 688 S.W.2d 100, 103 (Tex. 1985), rehearing of cause overruled (May 1, 1985); Restatement (2d) of Judgments section 87 (1982); C. Wright, A. Miller, & E. Cooper. Federal Practice & Procedure, Jurisdiction section 4468 (1981).

22 Pilie & Pilie v. Metz, 547 So.2d 1305, 1308 (La. 1989); Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993).

23 Stone v. Entergy Services, Inc, 99-0236*3 (La.App. 4th Cir, 8/18/99), 744 So.2d 141, 142; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989.

(2) The issue must have been actually litigated in the prior action;

(3) The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action; and

(4) There is no special circumstance that would make it unfair to apply the doctrine.[24]

All of the factors necessary for the court to apply the federal law of collateral estoppel have been met. First, as can be seen from the federal Complaint and the state court Petition, the takings issue is identical. Second, the takings issue was actually litigated in both the federal trial court and federal appellate court, with the appellate court specifically affirming summary judgment based on the fact that the Plaintiffs had no reasonable investment-backed expectations in their leases.[25] More importantly, the Fourth Circuit's opinion on rehearing does not indicate that there is any factual distinction between the two cases. As to the third element of the collateral estoppel test, the takings issue was a necessary part of the federal judgment. In fact, the decision on the takings issue was the core of the dispute. Finally, there is no special circumstance that would make it unfair to apply the doctrine of collateral estoppel.

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24 Copeland, supra, at 1423.

25 See App. C, infra, A-25 through A-44.

This Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[26] This application has been labeled defensive collateral estoppel, wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[27] As the United States Fifth Circuit has held, "collateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack."[28] In other words, the defensive use of collateral estoppel precludes a plaintiff from re-litigating identical issues by merely switching adversaries."[29] Stated succinctly, defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[30]

As the Federal Circuit affirmed the Court of Federal Claims' dismissal of the Plaintiffs' complaint on summary judgment, and all of the elements of collateral estoppel have been met, the Trial Court should have applied the doctrine of defensive collateral estoppel and dismissed the Plaintiffs' claims in the instant state litigation in their entirety. The

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26 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

27 Id.

28 Exhibitors Poster Exch., Inc. v. National Screen S.C., 517 F.2d 110, 114 (5th Cir. 1975).

29 Parklane Hosiery, supra, at 329, 651, citing Bernhard v. Bank of America Nat. Trust & Savings Assn., 122 P.2d 892, 895 (Cal. 1942).

30 Id.

mere substitution of governmental entities should not have resulted in a finding that collateral estoppel does not apply, where the factual record in the state and federal proceedings is, as here, identical.

CONCLUSION

If the lower State Court's decision is allowed to stand as is, a precedent will have been set for state courts to ignore the factual findings of a federal court deciding the same issue. This will not only lead to inconsistent decisions on the same issue but also spawn an entire wave of state litigation in which Plaintiffs may seek a "second bite at the apple." Plaintiffs will now be able to test their theories in federal court, and, if dissatisfied with the results, thereafter seek a different result on the same factual issue in a state court.

If allowed to stand, this decision will place at risk all governmental projects financed by combined State and Federal funding sources. Plaintiffs will test their theories in one court system or the other and then proceed to recovery in whichever court recognizes their claims. This anomalous situation encourges inconsistent findings by the Federal and State Court systems, in complete contravention of specific constitutional and statutory authority as interpreted by this Court.

RESPECTFULLY SUBMITTED,

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(2)

Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE
FOURTH CIRCUIT

APPENDIX VOLUME I
Appendix A - Appendix H

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INDEX TO APPENDIX

Page

APPENDIX A
Opinion on Rehearing, CA No. 99-0127 (La-App. 4th Cir. 3/15/00).....A-1

APPENDIX B
Trial Court's Judgment dated 1/5/991 25th JDC, Plaquemines Parish A-19

APPENDIX C
Original Opinion, CA No. 99-1027 (La.App. 4th Cir, 3/3/99).....A-25

APPENDIX D
La. Supreme Court Opinion on Writ Application (La. 6/23/00).....A-45

APPENDIX E
Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996)..A-46

APPENDIX F
Avenal v. United States 33 Fed. Cl. 778 (Fed. Cl. 1995).A-58

APPENDIX G
28 USCA § 1738.....A-91

APPENDIX H
U.S.C.A. Const. Art. IV § 1.....A-92

APPENDIX I
U.S.C.A. Const. Art. VI cl. 2.....A-93

APPENDIX J
Plaintiffs' Federal Complaint, CA No-94-261-L, United States Court of Federal Claims filed on 4/26/94 .....A-94

APPENDIX K
Plaintiffs' State Petition, CA No. 38-266, 25thJDC) Plaquemines Parish filed on 3/29/94 .....A-105

APPENDIX L
DNR's Motion for Summary Judgment Under the Doctrine of Collateral Estoppel, CA No. 38-266, 25th JDC, Plaquemines Parish filed on 12/15/98 .....A-115

APPENDIX M
Application for Writ of Certiorari, CA No. 00-CC-1077 Louisiana Supreme Court filed on 4/14/00.....A-127

APPENDIX A

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

ON APPLICATION FOR WRIT OF CERTIORARI
DIRECTED TO PLAQUEMINES
25TH JUDICIAL DISTRICT COURT
NO. 38-266, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

* * * * * *

JAMES F. MC KAY, III
JUDGE

* * * * * *

(Court composed of Chief Judge Robert J. Klees, Judge Miriam G. Waltzer, Judge James F. McKay, III, Judge Philip C. Ciaccio, Judge James C. Gulotta)

ON APPLICATION FOR REHEARING

CIACCIO, J., CONCURS WITH ADDITIONAL REASONS

WALTZER, J., DISSENTS

GULOTTA, J., RESPECTFULLY DISSENTS FOR THE REASONS ASSIGNED BY JUDGE MIRIAM WALTZER

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WRIT DENIED, JUDGEMENT AFFIRMED

In this class action, the defendant seeks review of the trial court's refusal to grant summary judgment. On rehearing, we deny the writ and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The impetus for the present litigation was the construction of the freshwater diversion structure located on the east bank of the Mississippi River at Caernarvon in Plaquemines Parish. As far back as the 1950's and 1960's, the federal and state governments were working on plans to divert freshwater from the Mississippi River into adjacent marshlands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity levels. The increased salinity levels were due to both man-made and natural causes. In 1965, Congress authorized the building of certain freshwater diversion structures in and around the Breton Sound Basin. In 1968, the U.S. Army Corps of Engineers first proposed Caernarvon as a sight for a freshwater diversion control structure.

Due to changes in the level of salinity, the zone favorable for oyster growth continued to move toward land during the 1970's. This change in salinity had the effect of rendering unusable large areas of previously productive oyster grounds. Between 1978 and 1982, the Corps held informal discussions with state and local agencies concerning the construction of a freshwater diversion structure located at Caernarvon. In September of 1984, the Corps issued a report that proposed that one large freshwater diversion structure be constructed at Caernarvon. Congress authorized funds for

the construction of the Caernarvon project in October of 1986.

Although the State of Louisiana expressed its intent to participate in the project as early as 1982, the state did not enter into a formal agreement with the Corps until June of 1987. The agreement provided that the State was to be responsible for twenty-five percent (25%) of the total costs of construction, and would maintain and operate the facilities following construction. Construction on the project commenced in June of 1988 and was completed in February of 1991. The Caernarvon project was modeled after smaller state and local diversion structures constructed in the 1950's and 1960's, which had proved effective in restoring oyster production previously destroyed by excessive salinity levels. However, the plaintiffs in the present suit allege that the freshwater diverted from the Mississippi River by the Caernarvon project dilutes the salinity of the water where their oyster leases are located, thereby increasing the growth of vegetation and bacteria on or near the water bottoms and causing silt to deposit there, thereby rendering plaintiffs' leases incapable of oyster growth and cultivation.

On March 29, 1994, the plaintiffs, certain oyster leaseholders/fishermen, filed the present class action on behalf of all persons holding oyster leases on state water bottoms in Breton Sound. The plaintiffs alleged that a taking without just compensation had occurred. The plaintiffs further alleged that this taking violated the Fifth Amendment of the United States Constitution and Article 1, § 4 of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the

Caernarvon freshwater diversion structure.

On April 26, 1994, virtually all of the representative plaintiffs in the present suit as well as some additional plaintiffs filed suit in the United States Court of Federal Claims against the U.S. Army Corps of Engineers, which designed, financed, and built the Caernarvon freshwater diversion structure. In that suit, the plaintiffs alleged a taking under the Fifth Amendment to the United States Constitution and sought class certification.

The defendants in the federal suit moved for summary judgment which the Court of Claims granted in August of 1995.[1] The decision was affirmed by the Federal Circuit Court of Appeals in November of 1996.[2] Following the decision of the Court of Appeals, the defendants in the present state court action filed a motion for summary judgment, arguing that collateral estoppel bars the re-litigation of issues already decided by the federal courts. The trial court denied the motion on January 5, 1998. The defendants sought review of that ruling from this Court. On March 3, 1999, the majority of a five-judge panel granted the defendant's writ and reversed the trial court's denial of summary judgment. The plaintiffs applied for rehearing which was granted by the same five-judge panel on March 26, 1999. In connection with the rehearing, this Court ordered that the entire record be forwarded to this Court and allowed additional briefing and set oral argument before this Court.

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[1] 33 Fed. Cl. 778 (1995)

[2] 100 F.3d 933 (Fed. Cir. 1996)

STANDARD OF REVIEW

In this case we must determine whether the trial court's denial of the defendant's motion for summary judgment was proper. Appellate courts must review summary judgments *de novo*. Act No. 483 of 1987 amended La. C.C.P. art.966 effective August 15, 1997, and it is to be applied retroactively as well as prospectively. Perry Waller v. American Seafoods Co., 97-0302, p.1 (La. App. 4 Cir. 10/1/97), 700 So.2d 1306, 1307, writ not considered, 97-2769 (La. 1/30/98), 709 So.2d 693. In the aforementioned case, the Court went on to explain:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La.C.C.P. art. 966 A (2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966 B. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. La.C.C.P. 966 C (2).

Id.

DISCUSSION

The question central to our analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law and if so whether the plaintiffs' action is barred by collateral estoppel. If the standard is the same or if the definition of a taking is broader under federal law, summary judgment should have been granted in the instant case. However, if the standard is different and the definition of a taking is broader under Louisiana law, the trial court's refusal to grant summary judgment was proper.

Louisiana law, which clearly pertains to the state law claims in this case, does not recognize the doctrine of collateral estoppel. Steptoe v. Lallie Kemp Hospital, 634 So.2d 331, 335 (La. 1994); Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978). In Welch, the Supreme Court rejected all forms of the doctrine, stating: "Collateral estoppel is a doctine of issue preclusion alien to Louisiana law. Developed in the common law, the device precluded the relitigation of issues actually decided in a prior suit between the parties on a different cause of action. Id. at 156. Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms.

Although the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking under the Louisiana Constitution is different. Article 1, § 4 of the Louisiana Constitution in

pertinent part provides: "Property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit."

There is a jurisprudentially recognized action for inverse condemnation arising out of "the self-execution nature of the constitutional command to pay just compensation." State through DOTD v. Chambers Investment Company, Inc., 595 So.2d 598, 602 (La. 1992). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property but just compensation has not been paid... Id.

In the instant case, the plaintiffs' oyster leases are a recognized property right under the laws of this state. The defendant's freshwater diversion project has allegedly caused damage to this right. The plaintiffs further claim that the defendant has not justly compensated them for their loss. Because the defendants have not paid any compensation to the plaintiffs, this case may amount to inverse condemnation.

Louisiana employs a three-pronged analysis to determine whether a claimant is entitled to eminent domain compensation. Id. at 603.

> Under this analysis, we must first determine if a person's legal right with respect to a thing or object has been affected. In other words, we must be able to identify a recognized species of property right that has been affected, regardless of whether causes of action may exist on the theories; otherwise, it cannot

> be said there has been an exercise of the power of eminent domain. Second, if it is determined that property is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under La. Const. Article I § 4.

Id. at 603.

A lessee's business losses, if proven to have been caused by the State's taking or damaging of property, are compensable under the "full extent of his loss" measure of recovery. State through Dept. of Highways v. Constant, 369 So.2d 699 (La. 1979). The lease of state-owned water bottoms for, among other purposes, oyster cultivation, is provided for by law. See La. R.S. 41:1255 and La. R.S. 56:421 et seq. The federal Court of Appeals has already found that the plaintiffs/oyster lessees have a protected property interest in their leases. It is not disputed that this property right has been adversely affected by state action. It is also clear that the creation of the Caenarvon freshwater diversion structure was for a public purpose.

Because this is the case, our analysis must now turn to the question of whether different standards should be applied in cases where inverse condemnation rather than formal expropriation of property has taken place. There is no basis in Louisiana law for the different treatment of property owners in these two situations. The same substan-

tive constitutional right (the right, secured by Art. 1, § 4 of the 1974 Louisiana Constitution, to receive full compensation for the governmental taking of private property) is triggered by both. The only bar (complete or partial) to compensation in either of these situations is bad faith. State, Dept. of Transp. and Development v. Vermillion Development Co., 249 So.2d 167, 258 La. 1159 (La. 1971); Parish of East Baton Rouge v. Landrum, 289 So.2d 215 (La.App. I CIR. 1973); Holland v. State, Dept. of Transp. and Development, 554 So.2d 727 (La.App. 2 Cir. 1989); State, Dept. of Transp. and Development v. Morein, 628 So.2d 1191 (La.App. 3 Cir. 1993); Packard's Western Store v. State, Dept. of Transp. and Development, 618 So.2d 1166 (La.App. 2 Cir. 1993). The "distinct investment-backed expectations" of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is irrelevant to the question of whether a taking has occurred under Louisiana law. There is nothing in the record of the instant case to indicate that the plaintiffs were in bad faith.

CONCLUSION

For the foregoing reasons we find that the trial court was correct in denying the defendant's motion for summary judgment. Accordingly, this writ is denied and the judgment of the trial court is affirmed. This case is remanded to the district court for further proceedings.

WRIT DENIED, JUDGMENT AFFIRMED

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * * * *

CIACCIO, J., - CONCURS WITH ADDITIONAL REASONS,

I voted to grant a rehearing because my review of our earlier opinion disclosed errors of law that had lead to an erroneous judgment.

State through Department of Transportation Development v. Chambers Inv. Co, 595 So.2d 598, 604 (La. 1992), was an inverse condemnation proceeding. It held that the action for inverse condemnation is a procedural remedy for an owner to seek compensation for an uncompensated taking or damaging against a governmental entity where no expropriation has commenced. Further, the action for inverse condenmation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. The Court made no distinction regarding the scope of compensation or the burden of proof applicable to claims arising out of inverse condemnation or formal expropriation. Accordingly, our earlier

opinion erred in finding a distinction between the two causes of action insofar as it would diminish the compensation payable to an inverse condemnation claimant.

Since the cause of action for an inverse condemnation claim arises out of the same self-executory nature of the constitutional demand to pay just compensation, State, through Department of Transportation and Development v. Chambers Inv. Co., supra at 598, the same rules of law and evidence apply to both types of proceedings.

In the case of State, Department of Transportation and Development v. Vermillion Development Co., 249 So.2d 167,258 La. 1159 (La. 1971), our Supreme Court enunciated the principle that knowledge of an anticipated expropriation does not bar a claim for compensation by a lessee of the property in the absence of proof of bad faith, fraudulent or predatory conduct. This rule of law has been uniformly followed in the cases cited in the majority opinion together with the case of Board of Commissioners v. Missouri Pacific Railroad, 625 So.2d 1070, 1076-78, (La. App. 4 Cir. 1993), writs denied, 630 So.2d 802-3 (La. 1994).

The crux of the dismissal of plaintiff's suit in the Federal Court was the finding that plaintiffs knowledge of the pending action. of the Corps of Engineers and the State of Louisiana prevented them from having a "reasonable investment backed expectation that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal government." But prior knowledge of an anticipated expropriation is not a bar to compensation under Louisiana law. Aside from the proce-

dural difficulty of applying collateral estoppel, the rule of law relied upon by the Federal court is contrary to the more liberal rule of law followed by our state courts.

No Louisiana case has denied compensation under the theory of the lack of a "justifiable investment backed reliance interest." In the case of Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission, 97-1367 (La. 5/19/98); 715 So.2d 387, 393, the plaintiffs commercial fishermen claimed to have a justifiable investment backed reliance interest in their right to fish. The Court did not decide the case on this basis but held that the plaintiffs did not possess a vested incorporeal right to fish so that there was no taking of any property right-corporeal or incorporeal-possessed by plaintiffs. Knowledge of an impending expropriation or regulatory action was not an issue.

Accordingly, I find no rule of law that requires us to use the Federal court decision to dismiss plaintiffs' suit on the basis of collateral estoppel. Plaintiffs' bad faith, if alleged, is a matter of proof that is clearly in dispute at this stage of the proceedings at the trial level. Accordingly, the granting of summary judgment was not appropriate.

The trial judge was correct in denying the motion for summary judgment.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * *

WALTZER, J. dissents.

On rehearing, the majority concluded that "Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms." They reasoned that "Although the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking under the Louisiana Constitution is different." Moreover, the majority opined that "The 'distinct investment-backed expectations' of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is irrelevant to the question of whether a taking has occurred under Louisiana law." From this opinion, I must dissent.

Concurring in the majority opinion, Judge Ciaccio posits that plaintiffs' "*prior knowledge* of an anticipated expropriation is not a bar to compensation under Louisiana law." Relying on *State of Louisiana, through the Department of Highways v. Vermilion Development Co.*, 249 So.2d 167,

and *Board of Commissioners v. Missouri Pacific Railroad Co.*, 625 So.2d 1070, the concurring opinion concludes that "the rule of law relied upon by the Federal court is contrary to the more liberal rule of law followed by our state courts." This opinion determined that the majority opinion on original hearing erred by "finding a distinction between the two causes of action [inverse condemnation and expropriation] insofar as it would diminish the compensation payable to an inverse condemnation claimant."

In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir. 1995). Although the leaseholders did not sue the State of Louisiana in the prior federal suit, such an identity of parties is not required to apply the doctrine of collateral estoppel, issue preclusion. *Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1970).

We granted rehearing in this matter to consider whether the issue actually litigated in the prior federal action is identical to an issue at stake in this subsequent state action. In the federal action, the court found that no compensable taking occurred, since the plaintiffs had taken advantage of favorable conditions created by prior projects, knew or should have known of the expected freshwater diversion project and its potential to adversely affect their

oyster leases, and could not have had a legitimate investment-backed expectation that conditions would remain favorable for oyster cultivation. Essentially, the federal court found that no constitutional taking had occurred, because the leaseholders did not have a legitimate investment-backed expectation. In determining what is a taking under the Louisiana Constitution, are the factors enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), relevant? I can find no authority for a conclusion that these factors are irrelevant. Moreover, numerous Louisiana cases have relied on federal authority for analyzing what is a constitutional "taking." *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission,* 97-1367 (La. 5/19/98); 715 So.2d 387, 392-93, *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87), *reversed for different reasons* 515 So.2d 1087 (La. 1987), *Annison v. Hoover*, 517 So.2d 420, 423 (La.App. 1 Cir. 12/22/87); *writ denied by* 519 So.2d 148 (La. 2/12/88), *Layne v. City of Mandeville,* 93-0046 (La.App. 1 Cir. 12/29/93); 633 So.2d 608, 6 10, *writ denied by* 94-0268 (La. 3/25/94); 635 So.2d 234, *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La.App. I Cir. 9/23/97); 700 So.2d 975, 984.

Both the majority and the concurring opinions concluded that Louisiana law does not distinguish between causes of action for inverse condemnation and expropriation, relying on *State through Department of Transportation and Development v. Chambers*, 91-1202 (La. 3/2/92); 595 So.2d 598. With this conclusion, I respectfully disagree. Louisiana law distinguishes between causes of action for inverse condemnation and expropriation. In *Chambers*, the

Louisiana Supreme Court recognized this distinction and stated "The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced." *supra*, at 602. The cases relied upon by the majority and concurring opinions involve expropriations and do not involve the issue central to this litigation, whether the state subjected the leaseholders' property to a constitutional taking. Moreover, expropriation proceedings, unlike inverse condemnation actions, are governed by LSA-R.S. 19:1, *et seq.*

Furthermore, the majority and concurring opinions rely upon *State through Department of Transportation and Development v. Vermillion Development Co.*, 249 So.2d 167 (La. 1971), for the principle that knowledge of an expropriation does not bar a claim for compensation, in the absence of bad faith. We are not confronted with the issue of appropriate compensation in this appeal. In this inverse condemnation action, we are asked to consider whether the leaseholders' property has been subjected to a constitutional taking. Whether knowledge of an expropriation bars compensation was not the issue addressed by the federal court in this litigation. Unless and until a constitutional taking is established, the issue of compensation should not be addressed. *Chambers, supra at* 603.

For the above reasons, I dissent from the opinion on rehearing.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * *

GULOTTA, J., RESPECTFULLY DISSENTS FOR THE REASONS ASSIGNED BY JUDGE MIRIAM WALTZER.

APPENDIX B

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266

DIVISION "B"

ALBERT J. AVENAL, JR.,et al

VERSUS

STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RE.SOURCES

FILED: January 5, 1999 JULIE V. COLE
DEPUTYCLERK

JUDGMENT

The Motion for Summary Judgment Under the Doctrine of Collateral Estoppel filed on behalf of Defendant, The State of Louisiana through the Department of Natural Resources, came before the Court for hearing on January 5, 1999.

Having considered the arguments of counsel, and based upon the pleadings filed on behalf of both Plaintiffs and Defendant, and for the reasons set forth at the hearing which are incorporated herein by this reference, the Defendants Motion for Summary Judgment Under the

Doctrine of Collateral Estoppel is DENIED and the request for stay is DENIED.

POINTE A LA HACHE, LOUISIANA this 5th day of January, 1999.

/s/ illegible
JUDGE

A TRUE COPY
/s/ illegible
Dy. Clerk of Court,
Parish of Plaquemines, La.

DO NOT CHARGE FOR SERVICE

(STATE AGENCY - R.S. 13:4521)

TWENTY FIFTH JUDICAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NUMBER: 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

versus

.THE STATE OF LOUISIANA,
and THE DEPARTMENT OF NATURAL RESOURCES

FILED: FEB - 1, 1999 /s/ illegible
DEPUTY CLERK

REASONS FOR JUDGMENT

The Court heard argument on various motions for summary judgment and motions in limine in regards to this captioned litigation on the 5th day of January, 1999. Several were taken under advisement by the Court.

For instance, the Defendants filed a motion for summary judgement in regards to the taking issue pled in the original petition and which is basically what this suit is about. The Court has denied that motion.

The Defendants seek to have this litigation dismissed arguing in that motion for summary judgment principally that the Plaintiffs could not have had a "reasonable expectation" that their leases would not be disturbed by freshwater

diversion projects. Because there is no constitutional guarantee of unimpeded revenue from oyster production, they argue, there is no claim as raised in this suit.

Additionally, the Defendants urge that this Court is bound by federal decisions to the effect that these claims are barred. Those federal decisions themselves bar these claims, they urge. Their arguments are in effect suggesting that these Plaintiffs have no cause or right of action and these proceedings should be dismissed.

The Court specifically rejects the notion that the Court of Claims proceeding on the federal level in anyway impedes the Plaintiffs' right to pursue this litigation. There is no need for Louisiana Courts to bring Louisiana law on this issue "in line with" federal decisions.

The State's motion also fails to preclude the Plaintiffs' right to recover as pled in this suit. While arguing the lack of any legal rights rather then attempting to foreclose factual issues which might show there is no claim herein, they have failed to establish either. The Plaintiffs have pled theories of recovery allowable under the law.

The Court was also presented with a motion in limine regarding the State's effort to introduce evidence of "hold harmless" provisions of the leases under which these claims arise. The Plaintiffs suggest that the enforceability either factually or legally of such a provision is an issue to be decided by the Court after trial, should there be a judg-

ment in their favor.

The Defendants have filed a motion for partial summary judgment on the issue of indemnity, again, an issue arising as a result of the contractual relationship between the Plaintiffs and the State. The Court believes that both these issues are not jury questions and must be decided by the Court, if applicable, after the jury findings.

Thus, the Court will not allow the State to argue to the jury that the Plaintiffs do not have a claim in this matter because of a hold harmless provision in the lease. There are no factual issues in that regard, rather, the State would have the jury decide a legal issue. Likewise, the issue of indemnity is one which the jury will not hear or be allowed to consider. It will be dealt with by the Court. That motion for summary judgment is deferred to a later time.

Finally, the Plaintiffs seek to preclude evidence that they are in "bad faith" in regards to their claims in that they acquired leases in anticipation of the freshwater diversion project and seek to be rewarded from this public works project rather then for being deprived of valid property rights. This motion is granted as well.

The Court does not consider it relevant for what reason a putative class member may have acquired an oyster lease. If such a lease was acquired and oysters produced and harvested, he may have a valid claim in this matter. If not, he may not have lost anything from, this alleged inverse condemnation. It serves no purpose to allow evidence of ill-

motive or bad faith.

The Plaintiffs are instructed to prepare a judgment in accordance with the Court's rulings herein.

Pointe-a-la-Hache, Louisiana, this 1st day of February, 1999.

/s/ illegible
JUDGE

A TRUE COPY

Dy. Clerk of Court,
Parish of
Plaquemines, La.

APPENDIX C

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

ON APPLICATION FOR WRIT OF CERTIORARI
DIRECTED TO
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 38-266, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

* * * * * *

MIRIAM G. WALTZER
JUDGE

* * * * * *

(Court composed of Chief Judge Robert J. Klees, Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Pro Tempore Philip C. Ciaccio and Judge Pro Tempore James C. Gulotta)

KLEES, C. J., CONCURS AND DISSENTS FOR, THE REASONS ASSIGNED BY JUDGE MCKAY.

MCKAY, J, CONCURS IN PART AND DISSENTS IN PART.

RICHARD P. IEYOUB, ATTORNEY GENERAL
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-AND-
PHILIP COSSICH
LAWRENCE DYESS
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WRIT GRANTED, JUDGMENT REVERSED

The state, defendant, seeks review of the denial of summary judgment. The state argues that a federal judgment, dismissing all claims by these same plaintiffs against the United States' government, precludes re-litigation of the same issues against the state in this second action.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, oyster leaseholders/fishermen, filed the present class action on 29 March 1994 on behalf of all persons holding oyster leases on state water bottoms in Breton Sound. Plaintiffs alleged that a taking had occurred without just compensation in violation of the Fifth Amendment to the U.S. Constitution and Article 1, § 4 of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the Caernarvon freshwater diversion structure, located on the east bank of the Mississippi River in Plaquemines Parish.

On 26 April 1994, Avenal and virtually all of the same representative plaintiffs in the present state suit, with some new ones, filed suit in the U.S. Court of Federal Claims against the United States and its agencies, including but not limited to the U.S. Army Corps of Engineers, which designed, financed and built the Caernarvon freshwater diversion structure. In that suit, the plaintiffs alleged a taking under the Fifth Amendment to the U.S. Constitution, one of the two claims raised in the present suit, and sought a class certification.

Defendant in the federal suit moved for summary judgment on several grounds. The Court of Claims granted

summary judgment in August 1995.[1] On appeal to the Court of Appeals for the Fifth Circuit, that decision was affirmed in November 1996 .[2]

Following the Avenal Fifth Circuit decision, defendant in the present state suit filed a motion for summary judgment arguing that collateral estoppel barred the re-litigation of the issues decided by federal judgment. The trial court denied the motion for summary judgment on 5 January 1998, "for the reasons set forth at the hearing" held that same date. (No transcript of the hearing is attached to defendant's writ application.)

Both the Court of Claims and the Fifth Circuit decisions are rich in facts. The undisputed facts, as taken from those decisions, show that federal and state government action was being planned as far back as the 1950's and 1960's to divert freshwater from the Mississippi River into adjacent marsh lands to improve oyster habitats and to reduce the mortality rate associated with increased salinity levels. According to a 1959 memorandum by the U.S. Fish and Wildlife Service to the U.S. Army Corps of Engineers, this action would benefit existing oyster-rich marshlands which had, over time, become too saline as a result of man-made and natural causes. Based on that memorandum, in 1965 Congress authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin, which lies east of the Mississippi River and south of New Orleans. In 1968, the Corps proposed Caernarvon as a situs for a freshwater diversion control structure .

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1 *Avenal v. United States*, 33 Fed. Cl. 778 (1995).

2 *Avenal v. United States*, 100 F. 3d 933 (5th Cir. 1996).

During the 1970's, the zone favorable for oyster growth continued to move landward, due to salinity changes, spawning an oyster community in marshlands which had previously been too fresh to sustain such growth. However, this inland movement of salinity had the deleterious effect of rendering unusable large areas of previously productive oyster grounds. The evidence showed that the representative plaintiffs in the federal suit, with few exceptions, the same representative plaintiffs in the present state action, had acquired their leases for oyster farming at the earliest, in 1976. These leases covered those areas which had previously been unsuitable for oyster growth.

Between 1978 and 1982 the Corps and relevant state and local agencies continued to discuss at informal meetings the construction of a freshwater diversion structure at Caernarvon. The Corps issued a final report in September 1984, proposing that one large freshwater diversion structure be constructed at Caernarvon. In October 1986, Congress authorized funds for the construction of the Caernarvon project.

Although the State of Louisiana expressed its intent to participate in the Caernarvon project as early as January 1982, the State did not enter into a formal agreement with the Corps until June 1987. The agreement provided that the State was to be responsible for 25 percent of the total costs of construction, and would maintain and operate the facilities following construction. Construction of the Caernarvon freshwater diversion project commenced in June 1988 and was completed in February 1991. The Caernarvon project was modeled after smaller state and local diversion struc-

tures constructed in the 1950's and 1960's, which had proved effective in restoring oyster production previously destroyed by excessive salinity levels.

Plaintiffs in both the federal suit and the present suit claim that the freshwater diverted from the Mississippi River by the Caernarvon project dilutes the salinity of the waters where their oyster leases are located, increases the growth of vegetation and bacteria on or near the water bottoms there, and causes silt to deposit there, rendering plaintiffs' leases incapable of oyster growth and cultivation.

In their motion for summary judgment filed in federal court, the United States alleged several grounds, including that the plaintiffs had no compensable expectancy in continued saltwater intrusion or a particular salinity level, and that the plaintiffs had no reasonable investment-backed expectations to continuation of the saltwater intrusion or a particular salinity level which was caused by earlier diversion of freshwater from its historic flows.

The Court of Claims ruled that the plaintiffs lacked a compensable property interest in the salinity of the water for purposes of the Fifth Amendment's taking clause and dismissed the suit. The Fifth Circuit affirmed that judgment on other grounds. The federal appellate court found that the plaintiffs did have a property interest, created by the state, which was protected by the Fifth Amendment, and that the federal and state project had altered the salinity conditions to the detriment of oyster cultivation. However, the court found that no compensable taking occurred since the plaintiffs had taken advantage of favorable conditions created by prior

projects, and knew or should have known of the expected freshwater diversion that would adversely affect their oyster leases, and thus could not have had a legitimate investment-backed expectation that conditions would remain favorable for oyster cultivation.

SUPERVISORY JURISDICTION

Clearly, the denial of a motion for summary judgment is an interlocutory judgment from which the parties do not have the right to appeal. LSA-C.C.P. art. 1841. However, our exercise of supervisory jurisdiction is purely discretionary. LSA-C-C.P. art. 2201.

In *Scott v. Pontchartrain Materials Corp.*, 98-1611, p. 3 (La.App. 4 Cir. 8/12/98) 717 So.2d 682, 684, this court stated:

> Appellate courts must review summary judgments de novo, Act No. 483 of 1997 amended La. C.C. P. art 966 effective August 15, 1997, and it is to be applied retroactively as well as prospectively. *Perry Waller v. American Seafoods Co.*, 97-0302, p. 1 (La.App. 4 Cir. 10/1/97), 700 So.2d 1306, 1307, *writ not considered,* 97-2769 (La. 1/30/98), 709 So.2d 693.
>
> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La.C.C.Pro. art. 966 A (2). A summary judgment shall be rendered

> forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. La.C.C.P. art. 966 C(2).

Id.

"Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." La.C.C.P. art. 966(C)(2).

Plaintiffs initially attack defendant's need for supervisory review, citing the lack of any showing of irreparable harm. LSA-C.C.P. art. 2083 (A). However, because summary judgment is now favored, this court reviews denials of motions for summary judgments in all but the most exceptional cases. This case does not present exceptional circumstances.

COLLATERAL ESTOPPEL

We must first consider the applicable law. Relators argue for application of federal law to determine the effect of this judgment rendered by a federal court. However, respondents argue for application of state law to this suit in state court.

We must apply federal law to determine the effect of the judgment, rendered in the federal action, on the proceedings in state court. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). We must apply federal law to "determine the **preclusive effects** of a judgment rendered by a federal court exercising federal question jurisdiction." *Id.* In the federal action, the fishermen sued under the United States' Constitution, and the federal court exercised its federal question jurisdiction. In *Reeder*, the Louisiana Supreme Court decided to apply federal law to determine the preclusive effect of a judgment from which the defendants asserted the defense of *res judicata* (or claim preclusion). Although we are asked to determine the: preclusive effect, based on collateral estoppel (or issue preclusion) of a judgment,, we are required to apply federal law.

Applying federal law to determine what effect the federal judgment has to this action, we consider the doctrine of collateral estoppel. Collateral estoppel requires the existence of three facts: (1) the issue at stake must be **identical** to the one involved in the prior action; (2) the issue must have been **actually litigated** in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the Judgment in that earlier action. *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir. 1995). Some cases recognize a fourth requirement for appli-

cation of issue preclusion, that no special circumstances exist rendering preclusion inappropriate or unfair. Id., at Fn. 12. Collateral estoppel, unlike res judicata, does not require mutuality between the parties to the prior action and the parties in the subsequent action in which the defendants raise the issue of collateral estoppel. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28L.Ed.2d 788.

Respondents argue that no identity of issues exists in the two separate actions, that the parties did not actually litigate the issue, and that fairness precludes application of collateral estoppel. An identity of issues exists when the facts and the legal standard used to assess the facts are the same in both proceedings. *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir. 1995). In the federal action, a class of oyster fishermen sued, under the United States Constitution, the federal government for compensation for a **taking**. Basically, the lessees alleged that the Caernarvon freshwater diversion project, constructed by both the federal and state government damaged their property, decreased the economic potential of their leases. They argued that this project caused conditions unfavorable to oyster growth, decreasing the value of their leases. These same fishermen/lessees sued the State of Louisiana for these same damages in this state proceeding under both the United States and the Louisiana Constitutions. We are presented in this action with the same plaintiffs seeking the same remedy for the same harm from a different defendant. Therefore, the facts in the federal action and the facts in this proceeding are exactly the same.

Essentially, we must determine whether the legal standard applied to the same facts in the federal action is the same legal standard applicable in this action. The United States and Louisiana Constitutions prevent takings by government entities without compensation. The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Louisiana Constitution likewise provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.

La.Const. art. 1 Sec. 4.

The federal constitutional provision protects against takings by both federal and state governments. However, the Louisiana Constitution does not protect against takings by the federal government. The Louisiana Constitution guarantees fewer protections against public takings than the United States Constitution. *State through Department of Transportation Development v. Chambers Inv. Co.*, 595 So.2d 598, 604 (La. 1992). Louisiana courts have consistently considered federal law in analyzing whether particular facts constitute a taking of property in similar **inverse condemnation** suits. *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission*, 97-1367 (La.

5/19/98); 715 So.2d 387, 392-93; *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87), *reversed for different reasons by* 515 So.2d 1087 (La. 1987); *Annison v. Hoover*, 517 So.2d 420, 423, (La.App. 1 Cir. 12/22/87); *writ denied* by 519 So.2d 148 (La. 2/12/88); *Layne v. City of Mandeville*, 633 So.2d 608, 610 (La.App. 1 Cir. 12/29/93), *writ denied* by 94-0268 (La. 3/25/94); 635 So.2d 234; *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La.App. 1 Cir. 9/23/97); 700 So.2d 975, 984. Clearly, a distinction exists between claims for inverse condemnation and claims for expropriation. Louisiana courts have explicitly recognized this distinction[3] *State, through Department of Transportation and Development v. Chambers Inv. Co., supra* at 602. Moreover, in determining whether a state law so limited the use of certain property to constitute a constitutional taking, the Louisiana Supreme Court recently addressed whether fishermen owning gill nets "have a **justifiable investment backed reliance interest**." *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission*, 97-1367 (La.5/19/98); 715 So.2d 387, 393. [Emphasis added.] That Court cited federal authority in its analysis of whether the gill net owners/fishermen suffered a taking because the new law "diminished the economic value of their equipment." *Id.*, at 392.

[3] Respondents rely on several expropriation cases to argue that the legal standard applicable to the facts in this state proceeding differs from the legal standard applicable in the federal proceeding. Expropriation proceedings are governed by LSA-R.S. 19: 1, et seq. These statutes do not govern claims for inverse condemnation.

In the lessees' federal action, the court of appeals reasoned:

> When government limits the use a property owner may make of her property, without itself occupying or using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 1045 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978): the court considers the character of the governmental action, the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. Id., at 124, 98 S.Ct., at 2659. Though it is a truism that "no set formula exists to determine whether compensation is constitutionally required for a government restriction of property." *Hendler v. United States,* 952 F.2d 1364,1373 (Fed.Cir. 1991), see *Penn Central*, 438 U.S., at 124, 98 S.Ct., at 2659, the Penn Central formulation provides guidance in analyzing what the trial court here viewed as a question of first impression.
>
> The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit. There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to

> claim surprise, however, that the preexisting salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.

Avenal v. United States, 915-5149 (Fed.Cir. 11/12/96); 100 F.3d 933, 937. Furthermore, the federal appeals court held, "these plaintiffs, in the words of *Penn Central*, cannot have had **reasonable** investment-backed expectations that their oyster leases would give them rights protected from -the planned freshwater diversion projects of the state and federal governments." *Id.* [Emphasis added.] Our review of the record and the applicable law persuades us that the issue decided in the federal action and the issue confronting the state court in this proceeding are identical. Therefore, we conclude that an identity of issues exists.

Respondents also argue that collateral estoppel does not apply to preclude re-litigation of their claims because the issue of whether they had reasonable investment-backed expectations, constituting a taking, was not actually litigated. Collateral estoppel is unavailable when a "new deter-mination of the issue is warranted by differences in the **quality or extensiveness of the procedure** followed in the two courts." *Copeland, supra* at 1423. [Emphasis added.] Respondents do not argue that the procedures employed by the federal court, as opposed to those procedures employed by the state court, differ. They do not even argue that the issue decided from the record on appeal was not "actually litigated." They argue only that we should disregard the federal judgment because the trial court based its conclusion on one reason, and the appeals court decided the case on another issue. We believe that the parties actually litigated

whether plaintiffs' "property interest was taken." *Avenal, supra* at 936.

Respondents argue that we should not apply the doctrine of collateral estoppel since special circumstances exist. We must consider "whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate." *Blonder-Tongue Laboratories, Inc., supra* at 329, 91 S.Ct., at 1443. The special circumstances upon which the respondents rely involve alleged errors in factual conclusions by the federal court of appeals because, as they contend, the record on appeal was incomplete. They do not allege that the federal proceedings denied them an "opportunity to litigate." Moreover, plaintiffs do not argue that the alleged circumstances resulted from the conduct of others. *Jenkins v. State*, 615 So.2d 405, 407 (La.App. 4 Cir. 1993), *writ denied* by, 617 So.2d 932. We do not believe that special circumstances exist.

CONCLUSION

Applying federal law to determine whether the doctrine of collateral estoppel precludes re-litigation of plaintiffs' claims for compensation for the diminution of the value of their oyster bed leases, we conclude that an issue necessary to their claims for relief in the state action was previously litigated and decided in the federal action. Accordingly, for the reasons discussed, we reverse the judgment of the trial court and dismiss the plaintiffs' claims under both the United States and Louisiana Constitutions, since the federal judgment precludes relitigation of an issue which a federal court has already decided.

WRIT GRANTED, JUDGEMENT REVERSED

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	

* * * * * * * *

KLEES, C.J.,- concurs and dissents for the reasons assigned by Judge McKay.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

MCKAY, J. CONCURS IN PART AND DISSENTS IN PART

I agree with the majority opinion as it applies to plaintiffs' federal claims. However, I must respectfully dissent with the majority's finding that plaintiffs' state law claims are also precluded.

Louisiana law, which clearly pertains to the state laws claims in this case, does not recognize the doctrine of collateral estoppel. Steptoe v. Lallie Kemp Hospital, 634 So. 2d 331, 335 (La. 1994); Welch v. Crown Zellerbac Corp., 359 So. 2nd 154, 156 (La. 1978). In Welch , the Supreme Court rejected all forms of the doctrine, stating:

> Collateral estoppel is a doctrine of issue preclusion alien to Louisiana Law. Developed in the common law, the device precluded the re-litigation of issues actually decide in a prior suit between the parties on a different cause of action.

Id. at 156. Since there has been no prior suit between the leaseholders and the Department of Natural Resources,

collateral estoppel, even if it existed in Louisiana is inapplicability its own terms.

Although, the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking is different under the Louisiana Constitution.

La. Const. Art. 1, § 4 provides in pertinent part:

> Property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with Just compensation paid to owner or into court for his benefit.

There is a jurisprudentially recognized action for inverse condemnation, which arises out of "the self-executing nature of the constitutional command to pay just compensation." Slate through DOTD v. Chambers Investment Company, Inc., 595 So. 2d 598, 602 (La. 1992). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property but just compensation has not been paid ... Id.

In the instant case, plaintiffs' oyster leases are a recognized property under the laws of this state. Defendants" fresh water diversion project has allegedly caused damage to this right. Further, plaintiff claims defendant has not justly compensated the plaintiffs' for their loss. Because the defendants have not paid any compensation to plaintiffs, this case may amount to inverse condemnation.

Louisiana employs a three-pronged analysis to determine whether a claimant is entitled to eminent domain compensation. Chambers, 595 So. 2d at 603.

> Under this analysis, we must first determine if a person's legal right with respect to a thing or object has been affected. In other words, we must be able to identify a recognized species of property right that has been affected, regardless of whether causes of action may exist on the theories; otherwise, it cannot be said there has been an exercise of the power of eminent domain. Second, if it is determined that property is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under La. Const. Article 1 §4.

595 So. 2d at 603.

A lessee's business losses, if proved to have been caused by the State's taking or damaging of property, are compensable under the "full extent of his loss" measure of recovery. State Through Dept. of Highways v. Constant, 369 So. 2d 699 (La. 1979). The lease of state-own water bottoms for, among other purposes, oyster cultivation, is provided for by law. See La. R.S. 41:1255 and R.S. 56:421 et seq. The plaintiff-oyster lessees have a protected. property interest in their leases as found by the United States Fifth Circuit Court of Appeal. It is not disputed that this property right has been

adversely affected by state action.

Accordingly, I agree with the trial court and would not grant the summary judgment in so far as it applies to any claims which plaintiffs may have under state law.

APPENDIX D

The Supreme Court of the State of Louisiana

ALBERT J. AVENAL JR., ET AL.

vs. NO. 2000-CC-1077

THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES

IN RE: State of Louisiana et al; Department of Natural Resources, Louisiana; - Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of Plaquemines, 25th Judicial District Court Div. B, Nos. 38-266; to the Court of Appeal, Fourth Circuit, No(s). 99-C-0127, 00-C-0855

June 23, 2000

Denied.

CDK
PFC
HTL
BJJ
CDT

KNOLL, J., not on panel.
MARCUS, J., would grant the writ.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
June 23, 2000
/s/ Katherine A. Fontana
Clerk of Court
Deputy For the Court

APPENDIX E

Albert J. AVENAL, Jr., and 129 similarly situated,
Plaintiffs-Appellants,
v.

The UNITED STATES, Defendant-Appellee.

No. 95-5149

United States Court of Appeals,
Federal Circuit.

Nov. 12, 1996.

Rehearing Denied Jan. 30, 1997.

Owners of state leases for water-bottom lands used for oyster propagation filed a complaint alleging a taking of their leasehold interests resulting from federal and state freshwater diversion project, which allegedly diluted salinity level in waters above their leased grounds and caused silt deposits in leased area so as to prevent owners from continuing to cultivate oysters. The Court of Federal Claims, Christine Odell Cook Miller, J., 33 Fed.CL 778, granted summary judgment for government, and owners appealed The Court of Appeals, Plager, Circuit Judge, held that: (1) owners had property interest protected by Fifth Amendment, but (2) project did not result in constitutional taking.

Affirmed.

Martin W. Matzen, Attorney, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for defendant-appellee. With him on the brief were Lois J. Schiffer, Assistant Attorney General, Jacques B. Gelin and Thorton Withers Field. Of counsel on the brief was Marco A. Rosamano, U.S. Army Corps of Engineers, New Orleans, Louisiana. Of counsel was David C. Shilton, Attorney, Environment and Natural Resources Division, Department of Justice, Washington, D.C.

Before RICH, NEWMAN and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This is a Takings case. [FN1] Albert Avenal, Jr. and 129 similarly situated plaintiffs ("Avenal" or "plaintiffs") leased oyster beds from the State of Louisiana. During the lease term, fresh-water diversion projects under the aegis of the United States altered the salinity level in the water over the oyster beds, thus rendering the beds unsuitable for oyster cultivation. Plaintiffs brought suit in the Court of Federal Claims alleging a taking by the United States ("Government") in violation of the Fifth Amendment of the Constitution. The Court of Federal Claims on summary judgment dismissed the claims, holding that Avenal never acquired a constitutionally protectable property interest. We affirm the judgment of the Court of Federal Claims, although on different grounds.

FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

BACKGROUND

The properties involved in this case are in The Breton Sound Basin, a part of the coastal waters of Louisiana lying east of the Mississippi River and south of New Orleans. Because the area contained a broad mixing zone of freshwater outflow from the Mississippi River and smaller coastal streams and the saline waters of the Gulf of Mexico, the area historically provided excellent conditions for oyster growth.

But life for the oysters, and for those who made their living harvesting them, did not remain sweet. Oysters to thrive need a salinity level ranging from 5 parts per thousand to 15 parts per thousand. Over time, both man-made and natural changes to the area caused the salinity levels in the sub-delta marsh lands below New Orleans to increase. The parties attribute the changes in salinity primarily to man-made causes, including the establishment of a levee system for flood control on the Mississippi, and oil and gas exploration that involved extensive canal networks. The natural changes stemmed from subsidence, shoreline erosion, and drought, all adding to the saltwater intrusion.

There is evidence that as early as 1900 the relevant state agencies and various parishes (similar to counties) were considering the idea that freshwater be diverted from the Mississippi River to adjacent marsh lands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity. In 1959, in a memorandum written by the United States Department of the Interior's Fish and Wildlife Service to the United States

Army Corps of Engineers ("Corps"), the Interior Department set forth its conclusions resulting from an investigation into the advisability of establishing *935 freshwater diversions via structures to be built for that purpose. The investigation itself was prompted, in part, by requests from local groups, including the oyster industry, concerning the need for such diversions.

The 1959 memorandum discussed a marked reduction in oyster yield that had occurred over time, and concluded that freshwater diversion would be beneficial in that it would re-establish natural patterns of salinity and increase oyster- bed fertility. The memorandum identified four separate areas in Plaquemines Parish as freshwater diversion sites, two of which are on the east side of the Mississippi. One of these two, Area 4, is in the vicinity of Scarsdale, in the upper landward end of the Breton Sound Basin. The area was described in the memorandum as itself being too fresh to support an oyster fishery, so that the effect of the Area 4 diversion would not be to change the salinity levels themselves, but to combat the effects of subsidence and push back salt-water intrusion.

The 1959 memorandum was later incorporated into House Document No. 308, which led to the passage, on October 27, 1965, of the Public Works--Rivers and Harbors Act, Pub.L. No. 89-298,79 Stat. 1037 (1965) (the "Act"), which authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin. During 1968 and 1969 the Corps met with, among others, the Louisiana Wildlife and Fisheries Commission and the Plaquemines Parish Commission Council to discuss proposed locations

for these Congressionally-authorized diversion structures. During public hearings, the Corps proposed Caernarvon as the location of the freshwater diversion structure for Area No.4.

Meanwhile, due to continuing salinity changes the zone favorable for oyster growth continued to move landward. This landward salinity movement spawned an oyster community in the marsh lands in the northwest portion of the Breton Sound Basin, in the area which had previously been too fresh to sustain such growth. While creating new oyster grounds, the change in salinity had the effect of rendering unusable large areas of previously productive oyster grounds. During the 1970's oyster farmers engaged in the spawning and harvesting of oysters noted the changed conditions in the northwest landward part of the Basin and entered into water-bottom lease agreements with the State of Louisiana for the areas then usable as oyster beds.

Over the ensuing years the Corps and relevant state and local agencies continued to discuss at informal meetings the construction of a freshwater diversion structure at Caernarvon. It was known by all parties, including both the state and plaintiffs, that the Caernarvon project would create an area in which conditions again would become too fresh for oyster cultivation, and that this area would coincide with an area which had been formerly too fresh for oyster cultivation. On January 21, 1982, the State of Louisiana submitted a letter to the Corps, announcing its intent to participate in the Caernarvon freshwater diversion project. The Corps and the State issued a joint public notice regarding the construction surrounding the Caernarvon project.

On October 30, 1986, Congress authorized the funds for the construction of the Caernarvon project The State of Louisiana entered into a formal agreement with the Corps stipulating that the State would maintain and operate the facilities following completion of construction, and that the State would be responsible for 25 percent of the total costs of construction. The agreement further provided an indemnification clause under which the State would indemnify the Federal Government for any losses occasioned by claims for "damages arising from the construction, operation, maintenance, and rehabilitation of the project..." The Caernarvon project was completed in due course, and it had the expected effect on the salinity levels in the Breton Sound Basin. Although the Caernarvon project was not itself completed until 1991, other freshwater diversion structures, upon which Caernarvon was modeled, had been completed earlier, some going back as early as 1956 (Bayou Lamoque) and 1964 (White Ditch Siphon).

On April 26, 1994, plaintiffs, who owned leases from the State of water- bottom lands used for oyster propagation, filed a complaint ***936** in the United States Court of Federal Claims, alleging a taking of their leasehold interests resulting from the Caernarvon project. Specifically, plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds and caused silt deposits in the leased area. These conditions were not favorable to oyster growth. As a result, the Government's Caernarvon project prevented them from continuing to cultivate oysters an their leased beds.

The Court of Federal Claims granted the

Government's motion for summary judgment on the grounds that the oysterers held no compensable property interest Since the State acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds, plaintiffs could have acquired no such right from the State, and thus no property interest to be taken. Plaintiffs appeal that determination.

DISCUSSION

[1][2][3] Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. On appeal, the views of the trial court regarding the applicable law in light of the undisputed facts are given full consideration, but a grant of summary judgment is reviewed without special deference to the trial court's decision. In this case, though the parties disagree about certain factual issues, the facts material to the decision are not in genuine dispute. Summary judgment is fully appropriate in such a case; that it is a takings case does not affect the availability of summary judgment when appropriate to the circumstances.

[4] The case was argued below, and the trial judge based her decision, on the issue of whether these plaintiffs owned a compensable property interest. Much of the argument there, as on appeal, focused on whether plaintiffs have a vested right, derived from the State, in an unintended benefit resulting from a federal government project, such that cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment.

The record establishes that plaintiffs own long-term leases from the State, which leases entitle plaintiffs to use the lands under the waters of the Breton Sound Basin for the cultivation and harvesting of oysters. No challenge is made to the right of the State to issue such leases, or to the right of the lessees to engage in the activity for which the leases are issued. The record does not establish exactly when the several plaintiffs first acquired their leases. The trial court, in absence of evidence from the plaintiffs, made the reasonable inference that, for purposes of plaintiffs' complaint, the leases should be considered to have been entered into no earlier than 1976. This was arrived at by subtracting the term of the leases, 15 years, from the date on which the freshwater diversion from the Caernarvon project became operational, 1991.

[5] The leases owned by the several plaintiffs granted them valuable property rights. Louisiana law has long recognized that the property rights created by such leases, authorized by state statute (see La.Rev.Stat.Ann. § 56:423 (West 1995)), have the attributes of other forms of real property, and are entitled to protection from injury by third parties. See e.g., Inabnet v. Exxon Corp., 642 So.2d 1243 (La.1994) (Oil company found liable to oyster lessee for any damages sustained by oyster lessee due to company's dredging of canal.); Butler v. Baber, 529 So.2d 374 (La.1988) (Oyster lessees could recover against mineral lessees for damage to oyster beds and oyster production caused by mineral lessees' dredging operation). The United States Constitution protects such state-created property interests from uncompensated takings by government, whether that government be state, Lucas v. South Carolina

Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), or federal, Hendler v. United States, 952 F.2d 1364 (Fed.Cir.199i).

[6] The question, then, is not whether the plaintiffs had a constitutionally protected property interest, but whether that property interest was taken by the Government The leasehold estates owned by the plaintiffs entitle them to use the beds of the Basin for the ***937** cultivation of oysters. **[FN2]** The result of the series of government decisions that culminated in the Caernarvon project was not to occupy the plaintiffs' property or to have that property used for government purposes, but was to limit the uses of the property available to plaintiffs. There can be no doubt from the record that the limit on plaintiffs' use imposed by the Government's activities had the effect of substantially reducing the value of plaintiffs' property, well beyond the level of "mere diminution." Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570 (Fed.Cir. 1994).

FN2. The trial judge found that the record does not reflect the exact location of plaintiffs' leases. The trial court concluded that, in absence of other proof, the plaintiffs concede that the leases are located in the northwest landward end of the Breton Sound Basin.

[7] When government limits the use a property owner may make of her property, without itself occupying or otherwise using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978): the court considers the character of the governmental action,

the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. Id. at 124,98 S.Ct. at 2659. Though it is a truism that "no set formula exists to determine whether compensation is constitutionally due for a government restriction of property," Hendler v. United States, 952 F.2d 1364, 1373 (Fed.Cir.1991), see Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, the Penn Central formulation provides guidance in analyzing what the trial court here viewed as a question of first impression.

The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to 100 F.3d 933 their (this time) disadvantage.

Though as entrepreneurs they are entitled to capitalize on the opportunities afforded by government action, they cannot here insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely-shared public concerns, including concerns of the oystering industry itself, government actions were being planned and executed that would

directly affect their new economic investments. These concerns and plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. Assuming, as we must, that these plaintiffs did not invest in their leases until the 1970's, these plaintiffs, in the words of Penn Central, cannot have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments.

The arguments put forward by plaintiffs do not persuade us otherwise. We grant that they have valuable property rights created by the State and protected by the Constitution. These rights include the right to harvest oysters and the right to damages when the acts of another harm the oyster beds, including harm caused by deleterious changes in the waters in which the beds lie, for example by unlawful pollution.

We grant that the decrease in salinity in the water covering the plaintiffs' leased grounds has restrained a valuable use of the lease rights. And plaintiffs are correct that the existence of certain hold-harmless clauses in some of the leases for the benefit of the federal government and against the state does not *933 change the case. Having said all that, however, what we do not grant these plaintiffs is the right to be free from the planned and announced efforts of the Government to act in ways that would affect their uses

of their after-acquired property interests. **[FN3]** In light of the history of events in this case, plaintiffs as a matter of law must be assumed to have known that their rightS to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.

FN3. Plaintiffs' heavy reliance, particularly in their reply brief, on the panel opinion in Preseault v. United States, 66 F.3d 1167 (Fed.Cir.1995), and particularly the role of federal law in defining state property rights, it of course not persuasive since that opinion has since been vacated by vote of the in banc court. See 66 F.3d 1190 (Fed.Cir. 1995).

We reach, then, the same result as the trial court. In this case there was no taking by the United States of a protected property interest. The judgment of the trial court is

AFFIRMED.

END OF DOCUMENT

APPENDIX F

Albert J. AVENAL, Jr., et al. Plaintiffs,
v.

The UNITED STATES, Defendant.

No. 94-261L.

United States Court of Federal Claims.

Aug. 2, 1995.

Lessees of waterbottoms used for oyster farming brought action alleging taking of their leasehold interests as result of freshwater diversion project On government's motion for summary judgment, the United States Court of Federal Claims, Miller, J., held that lessees lacked compensable property interest in salinity of water for purposes of Fifth Amendment takings claim.

Motion granted.

Thornton Withers Field, Washington, DC, with whom was Asst. Atty. Gen. Lois J. Schiffer, for defendant Marco A. Rosamano, U.S. Army Corps of Engineers, New Orleans Dist. RED VOID of counsel.

OPINION

MILLER, Judge.

This case is before the court after argument on

defendant's motion for summary judgment. The issue is whether plaintiffs, who lease certain water- bottoms in the Breton Sound Basin, Louisiana, for oyster farming, hold a compensable property interest for purposes of the Fifth Amendment

FACTS

The following facts are undisputed, except where noted. On October 27, 1965, Congress enacted the "Public Works--Rivers and Harbors Act," Pub.L. No. 89-298, 79 Stat. 1073 (1965) (the "Act"), which authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin, which lies east of the Mississippi River and south of New Orleans, Louisiana. The location and description of the approved structures originally were set forth in a memorandum dated June 16, 1959, from the United States Department of the Interior, Fish and Wildlife Service to the United States Army Corps of Engineers (the "Corps") (the "1959 memorandum") and later incorporated into House Document No. 308, which Congress approved in the Act.

The 1959 memorandum represents the conclusions of the Fish and Wildlife Service concerning its investigation as to the advisability of introducing fresh water from the Mississippi River into the sub-delta marshes below New Orleans, Louisiana, via freshwater diversion structures. The investigation was prompted, in part, by requests from local groups, including the oyster industry, which attended a public hearing in New Orleans on April 25, 1955, concerning the need for freshwater diversions.

The coastal waters of Louisiana historically provided excellent conditions for oyster growth, because the area contained a broad mixing zone of freshwater outflow from the Mississippi River and smaller coastal streams and the saline waters of the Gulf of Mexico. According to the 1959 memorandum, certain man- made and natural causes, over time, had increased the salinity level of the sub-delta marsh lands below New Orleans, thereby adversely affecting fish and ***780** wildlife, including oysters, waterfowl, and fur animals. The parties attribute the changes in salinity primarily to man-made causes, including the Federal Government's involvement in the creation of a levee system for flood protection of the Mississippi River and the oil and gas industry's creation of extensive canal networks. The record indicates that the Corps became involved in levee projects as early as 1927. **[FNI]** The natural causes resulting in increased salinity stemmed from subsidence, shoreline erosion, and severe drought

FNI. Defendant's expert, Coastal Environments, Inc., states in a report dated February 1995, at p. 2-14:
"Following the great flood of 1927, the Mississippi River Commission and the Corps of Engineers devised a plan to direct flood waters safely to the Gulf. The plan included channel straightening and training, levee improvements, and construction of several major spillways or floodways...." Defendant acknowledges that the state did play a role in the flood control projects. These facts are recited as background.

The optimal salinity level for oysters ranges from 5 parts per thousand ("ppt.") to 15 ppt. Oysters, for various reasons, cannot survive in salinity levels beyond this range. The 1959 memorandum specifies that, as early as 1900, the

Louisiana Wildlife and Fisheries Commission [FN2], its predecessors, and various parishes had recommended that freshwater be diverted from the Mississippi River to adjacent marsh lands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity.

FN2. Although the Louisiana Wildlife and Fisheries Commission has been renamed on various occasions before and after 1959, the court, for purposes of clarity, shall refer to the organization under this name.

After finding "a marked reduction [in oyster yield] per unit area" over time, [FN3] the Fish and Wildlife Service in the 1959 memorandum concluded that "[introduction of fresh water to re-establish natural patterns of salinity and alluviation and increase fertility would provide the most effective method of restoring fish and wildlife production." (Emphasis added.) The 1959 memorandum identified four separate areas in Plaquimines Parish as freshwater diversion sites, two of which were located on the west side of the Mississippi, Areas No. I and 3, and two on the east side, Areas No.2 and 4. The diversion structures were designed to benefit both public seed grounds and privately-held water-bottom leases obtained from the state for oyster farming.

FN3. Plaintiffs contend that Louisiana's oyster production has remained constant for three decades. Although defendant does not dispute this proposed finding, in response to a separate proposed finding, defendant proffered expert reports which stipulate that" '[w]hile Louisiana's oyster production from private grounds has remained relatively stable during 1961-1988 ranging from 7.5 to 10.1 million pounds, the acreage devoted to the production of these oysters has increased more than five times.'" Def's Reply to Plfs' Statement of Genuine Issues of Fact No. 27, filed June 2, 1995

(quoting Berrigan, et al. (1991)). Although the 1959 memorandum supports defendant's position, the court does not resolve this issue on summary judgment. It is not material to the issue for resolution, in any event.

The freshwater diversion control structure for Area No.4, to be located in the vicinity of Scarsdale, in the upper landward end of the Basin, was intended to carry waters to Grand Lake. The 1959 memorandum defined Area No. 4 as being "too fresh to support an oyster fishery, but ... one of the best muskrat marshes in Louisiana...." According to the memorandum, "[w]ater discharge requirements in this area differ[ed] from the other [three] areas in that the major purpose ... [was] not to effect a 50 percent dilution.... [but] rather to prevent and push back salt-water intrusion ... to combat the effects of subsidence and destruction of vegetation by muskrats...." The memorandum finally stated:
"Pollution would not be a problem in Area No. 4 as in the other areas because an oyster fishery ... [was] not present..." Thus, as of 1959, areas in the vicinity of Scarsdale, located in the upper landward end of the Breton Sound Basin, had no recognizable oyster industry because the waters were too fresh to sustain such a habitat.

Between 1968 and 1969, the Corps met with local interests, including the Louisiana Wildlife and Fisheries Commission and the Plaquemines Parish Commission Council, to discuss proposed locations for the diversion structures authorized by Congress. During Corps-sponsored public hearings held in November *781 and December 1968, the Corps proposed Caernarvon as the situs of the freshwater diversion structure for Area No. 4 to be located on the cast side of the Mississippi.

[FN4] According to defendant's expert report, Caernarvon is located "only a few miles downstream" from Scarsdale. Report of Coastal Environments, Inc., pp. 4-6 (Feb. 1995). It is within the general vicinity of Scarsdale, a fact that plaintiffs do not dispute, and therefore falls within the area described by the 1959 memorandum as the site for the control structure at Area No.4.

FN4. The record is unclear as to whether the 1968 and 1969 meetings were intended to identify the diversion structure locations for the areas discussed in the 1965 Act, or whether such meetings concerned other non-authorized diversion projects. When questioned as to the purpose of the meetings, defendant implied that the meetings occurred in response to the Act. Defendant, however, did not respond as to whether the 1968 and 1969 meetings pertained to Areas No. 2 and 4, discussed in the 1959 memorandum. Given the substance of the 1959 memorandum, the court infers that the meetings did address proposed locations for Areas No. 2 and 4.

In 1969 the Louisiana Wildlife and Fisheries Commission, the Plaquemines Parish Commission Council, and the Corps agreed to construct a freshwater diversion structure in the vicinity of the Nestor Canal in the Bohemia Spillway area on the east bank of the Mississippi River. In discussing Area 2, the second diversion structure to be located on the east bank, the 1959 memorandum specified that the diversion structure should be built in the vicinity of Bohemia; the Nestor Canal satisfies this locational requirement

During the 1970's the zone favorable for oyster growth continued to move landward, due to salinity changes. This landward salinity movement spawned an oyster community in the marsh lands in the northwest portion

of the Breton Sound Basin, which had previously been too fresh to sustain such growth. While creating new oyster grounds, the inland movement of salinity had the deleterious effect of rendering unusable large areas of previously productive oyster grounds. **[FN5]** Many in the oyster industry noted the changed conditions in the northwest landward part of the Basin and entered into water-bottom lease agreements with the Louisiana Wildlife and Fisheries Commission. The leases extended for 15 years and covered a maximum of 1,000 acres. **[FN6]**

FN5. The massive oyster mortality on formerly productive private leases and state seed grounds had been a source of concern for the State of Louisiana since the 1940s.

FN6. The lease includes both general provisions and conditional clauses, the latter of which are project-specific. The general provisions of the lease changed over time. In 1976 the Louisiana Wildlife and Fisheries Commission inserted the following: "This lease is also subject to Commission policies not stipulated by regulations...." Def's Proposed Findings of Fact No. 73, filed Feb. 7, 1995. Between 1988 and 1990, the Commission again modified the lease to include a hold-harmless provision, which precluded lessees from seeking damages from the state for losses resulting from freshwater diversion projects. According to defendant, leases issued prior to the 1988-1990 timeframe were not amended to include a hold-harmless clause.

Between 1978 and 1982 the Corps and relevant state and local agencies continued to discuss at informal meetings constructing a freshwater diversion structure at Caernarvon. On January 21, 1982, the State of Louisiana submitted a letter to the Corps, announcing its intent to participate in the Caernarvon freshwater diversion project. The Corps and the Louisiana Department of Natural Resources

issued a joint public notice as to the construction surrounding the Caernarvon project in 1982. In May 1982 the Corps also issued a draft report and environmental impact statement, entitled Louisiana Coastal Area, Louisiana, Feasibility Report on Freshwater Diversion to Barataria and Breton Sound Basins, addressing the importance of the Caernarvon structure. The Corps issued the final report in September 1984.

The final report provided for only one large freshwater diversion structure to be constructed at Caernarvon, even though the Act authorized the construction of two smaller structures on the east side of the Mississippi River. **[FN7]** "The zone where conditions ***782** will become too fresh for oyster cultivation as a result of the [Caernarvon] diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation." Defs Proposed Findings of Fact No. 8, filed Feb. 7, 1995 (citations omitted). Plaintiffs do not dispute this fact.

[FN7]. Although during argument the court inquired of defendant as to the date of the decision to consolidate the two structures designated in the 1959 memorandum, defendant could not provide the exact date on which the decision was made. Information of record, however, does indicate that the decision was made by 1982.

The Caernarvon project was designed not only to abate saltwater intrusion, but also to abate marine tidal invasion. At the July 31, 1984 public hearing, the President of the Louisiana Oyster Dealers and Growers indicated his support for both the Caernarvon project and freshwater diversion structures generally.

On October 30, 1986, Congress authorized the funds for the construction of the Caernarvon project through the Fiscal Year 1987 Energy and Water Development and Appropriations Act, Pub.L. No. 99-591, 100 Stat 3341, 3341-195 (1986). Although the State of Louisiana expressed its intent to participate in the Caernarvon project as early as January 1982, the state did not enter into a formal cooperation agreement with the Corps until June 10, 1987. That agreement identified the Caernarvon project as one of the four sites originally authorized by the Act:

> WHEREAS, the Mississippi River and Tributaries Project was authorized by the Flood Control Act of 1928 (May 15, 1928, Public Law No. 70-391) and modified and expanded by the Flood Control Act of 1965 (October 27, 1965, Public Law 89-298) to include the Mississippi Delta Region Project as recommended by the Chief of Engineers in House Document No. 308,88th Congress, 2d Session; and WHEREAS, the Caernarvon Freshwater Diversion Structure (hereinafter referred to as the "Project") is one of the four sites authorized under the Lower Mississippi Delta Region project by the Flood Control Act of 1965 (October 27, 1965, Public Law 89-298)....

(Emphasis added.)

The agreement stipulated that the state shall maintain and operate the facilities following completion of construction, and that the state shall be responsible for 25 percent of the total costs of construction. The agreement further provided an indemnification clause, whereby the state would indemnify the Federal Government for any losses occasioned by claims for "damages arising from the

construction, operation, maintenance, and rehabilitation of the project, except [that the state would not indemnify] for damages due to the fault or negligence of the Government or its contractors."

Construction commenced at the Caernarvon site on June 7, 1988, and was completed in February 1991. The Caernavon project, however, was not the first freshwater diversion structure to be constructed in the area. The State of Louisiana constructed the Bayou Lamoque freshwater diversion structure in 1956 and expanded the structure in 1975. Other diversion structures in the area included the White (or Whites) Ditch Siphon, completed in 1964. The Caernarvon project, in fact, was modeled after these smaller state and local ventures, which had proved effective in restoring oyster production previously destroyed by excessive salinities.

On April 26, 1994, several owners of water-bottom leases, who, at the earliest, acquired their leases for oyster farming by 1976, **[FN8]** filed a complaint in the United States Court of Federal Claims, alleging a taking of their leasehold interests resulting from the Caernarvon project. Specifically, plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds and caused silt deposits in the leased area. These conditions were not favorable to oyster growth, and therefore plaintiffs claim that the Federal Government through the Caernarvon project disabled them from continuing to cultivate oysters.

FN8. The record is devoid of any evidence as to the exact dates on which the plaintiffs acquired their leases. During argument, defen-

dant explained that he derived the 1976 date by subtracting 15 years, the length of the state lease, from the date on which Caernarvon opened, which was 1991.

Although the record does not reflect the exact location of plaintiffs' leases, plaintiffs concede that the leases were located in areas which prior to 1960 were too fresh to sustain *783 oyster growth. See Plfs' Br. filed May 2, 1995, at 3 (stating that "saltwater intrusion has led to the displacement of areas previously (pre-1960) having favorable oyster growing conditions in the outer Breton Sound Basin and the development of additional, inner Breton Sound Basin areas more favorable to oyster growing conditions, which were previously (pre-1960) too fresh for oyster habitats....') (citations omitted). In defining the location of these areas previously too fresh for oyster development, plaintiffs discuss the northwest Landward end of the Breton Sound Basin, which is the same general area covered by Area No. 4 identified in the 1959 memorandum.

Plaintiffs also filed a motion for class certification on April 26, 1994, seeking to certify as a class hundreds of oyster lessees of water bottoms in the vicinity of the Breton Sound Basin whose leases had been impaired by the activity of the Federal Government through the Caernavon project There are 130 named plaintiffs in the action, some of whom hold an undivided fractional interest in only a few acres; others are the sole lessees of 1,000 acres, the maximum amount that may be leased under state law. In an order dated July 21, 1994, the court deferred decision on the motion.

Defendant moved for summary judgment, arguing

that plaintiffs' takings claim must fail because they lack a compensable property interest for purposes of the Fifth Amendment. In support of their opposition, plaintiffs filed additional proposed findings of uncontroverted fact pursuant to RCFC 56(d). Specifically, plaintiffs note that over 25 years had passed between the issuance of the 1959 memorandum proposing four diversion structures, two of which were to be located on the east bank of the Mississippi River, and the issuance of the final report in 1984, listing Caernarvon as the only freshwater diversion site on the east bank. Accordingly, plaintiffs maintain that they could not be charged with notice as to the exact locations or specific effects of the Caernarvon project.

Defendant rejoins that "[b]ecause of the natural configuration and hydrology of the Breton Estuarine Basin, the upper and middle basins would have become fresher regardless of the specific location of the diversion or regardless if one or more structures had been built...." Def's Reply to Plfs' Statement of Genuine Issues of Fact No. 64, filed June 2, 1995. Defendant points out that plaintiffs do not contest that one of the original objectives of the project was to restore historic freshwater conditions to the upper and middle basins. Moreover, the record shows that the areas leased by plaintiffs historically were too fresh for oysters to flourish.

Plaintiffs also maintain that they reasonably could not have foreseen where salinity changes would occur due to the project, because the Corps erred in forecasting future salinity ranges in its final report issued in 1984. Plaintiffs contend that the Corps' projected salinity estimates are

inconsistent with actual data obtained once the project was operational. Defendant disputes this characterization, claiming that the report identified long-term salinity estimates and, therefore, that it is inappropriate to cite data received over a one- to two-year period and point to inaccuracies. In addition, defendant contends that the evidence accumulated to date has shown both that the project's benefits with respect to the public seed grounds had exceeded expectations and that historic salinity conditions were being restored, a stated goal of the project See Def's Statement of Genuine Issues in Reply to Plfs' Additional Proposed Findings of Uncontroverted Fact No. 4, filed June 2, 1995 (quoting Memorandum from Robert L. Ancelet, 1994-95 Oyster Season Forecast (1994)) (stating that "[i]n Coastal Study Area II, oyster availability has increased for the third consecutive year, an unprecedented reversal of the general trends observed since 1975....' ").

Finally, plaintiffs assert that the Caernarvon Project has increased the areas subject to seasonal closures. The Louisiana Department of Health periodically closes certain areas of leased water bottoms throughout the season due to increased levels of fecal coliform, a bacterium. Defendant questions the support plaintiffs cite for their factual assertion. Defendant further contends that the problems associated with increased levels of fecal coliform have plagued oyster farmers ***784** for years. The increased levels occur as a result of many factors, including pollution from urban runoff, which occurs frequently following heavy or torrential rainfall. Defendant also notes that the closure areas highlighted by plaintiffs are not restricted to the Caernarvon area and that the areas approximate the scope of those

occurring prior to the opening of the Caernarvon structure.

DISCUSSION

I. Summary judgment

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Only disputes over material facts, or facts that might significantly affect the outcome of the suit under the governing law, preclude an entry of judgment Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing that there are no genuine material issues in dispute and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548,2552, 91 L.Ed.2d 265 (1986).

[l][2] Due to the ad hoc nature of takings inquiries, the issues involved are normally fact issues that must be determined either on the entirety of a complete record or at trial. Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1560 (Fed.Cir.1985); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 891 (Fed.Cir.l983). The harsh finality of summary judgment also dictates 'its application must be accompanied by great care in respect of the entire record and the relevant law....' Yuba Goldfields, 723 F.2d at 891. In Celotex the Supreme Court stated:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof...
477 U.S. at 322-23, 106 S.Ct. at 2552. An opponent of summary judgment 'must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant....' Barmag Banner Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831,836 (Fed.Cir. 1984); sec Union Carbide Corp. v. American Can Co., 724 F.2d 1567, 1571 (Fed.Cir.l984). Argument and assertions of counsel cannot substitute for factual statements under oath that establish a genuine issue of material fact Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1404 (Fed.Cir.1984). If defendant submits an affidavit on a material point, plaintiffs must respond with an affidavit. See Royal Indem. Co. v. United States, 178 CT.CL. 46, 51, 371 F.2d 462, 465, cert. denied, 389 U.S. 833, 88 S.Ct. 33, 19 L.Ed.2d 93 (1967). Nonetheless, an opponent of summary judgment is entitled to "all applicable presumptions, inferences, and intendments." H.F. Allen Orchards v. United States, 749 F.2d 1571, 1574 (Fed.Cir.1984), cert. denied, 474 U.S. 818, 106 Set 64, 88 L.Ed.2d 52(1985).

Although '[t]he fact-intensive nature of just compensation jurisprudence to date ... argues against precipitous

grants of summary judgment ..., [t]here... [are] cases in which the United States as the mo'~ing party is 'entitled to judgment as a matter of law, and where it is quite clear what the truth is....' Yuba Goldfields, 723 F.2d at 887 (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944)). Because the parties do not dispute the facts material to a dispositive issue, this is an example of such a case.

2. Takings

[3] For a takings claim to succeed under the Fifth Amendment, under either a physical *785 invasion or regulatory takings theory, a claimant must first establish a compensable property interest. Lucas v. South Carolina Coastal Council, --- U.S. ----, ---- - -----, 112 S.Ct 2886, 2899-900, 120 L.Ed.2d 798 (1992); Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 100 S.Ct 383, 392-93, 62 L.Ed.2d 332 (1979); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580 (Fed.Cir. 1993); Preseault v. United States, 27 Fed.C1. 69, 84 (1992), appeal pending, No. 93-5067 (Fed.Cir. argued Dec. 9, 1993); see M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed.Cir. 1995) (holding that takings claim involving governmental action resulting in land use restriction requires two-step analysis, first is to identify whether compensable property interest exists).

[14] However, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them...." United States v. Willow River Power Co., 324 U.S. 499, 502, 65 S.Ct 761, 764, 89 L.Ed. 1101 (1945); see Penn Cent Transp. Co. v.

New York City, 438 U.S. 104, 124-25, 98 S.Ct 2646, 2659, 57 L.Ed.2d 631 (1978) (noting that courts dismiss takings claims where "the challenged government action [which] caused economic harm ... d[oes] not interfere with interests that ... [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes") (citations omitted); Skip Kirchdorfer, 6 F.3d at 1580 (holding that '[n]ot all losses generate a Fifth Amendment taking....'; landowner must establish "a legally-cognizable property interest") (citation omitted); Shanghai Power Co. V. United States, 4 Cl.Ct 237 (1983) (same), affd, 765 F.2d 159 (Fed.Cir.) (Table), cert. denied, 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 243 (1985). For example, a landowner cannot acquire a property interest in the high-water level of a navigable river. Willow River, 324 U.S. at 511, 65 S.Ct. at 768; see Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88, 33 S.Ct. 679, 680, 57 L.Ed. 1083 (1913) (holding that landowner holds title to submerged lands under navigable waters, but title is qualified because it is subordinate to United States' right of navigation).

[5] Once a legally-cognizable property interest is established, the court must identify the nature of the taking, be it physical or regulatory. If the governmental action constitutes a regulatory taking, the court then applies the well-established three-prong test, requiring analysis of " 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed, expectations.' " Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984) (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83,

100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980)) (citations omitted).

[6] Without providing authority, plaintiffs argue that they need not establish the existence of a compensable property interest when the governmental action effects a physical taking. Defendant rejoins that the compensable property interest requirement applies regardless of the nature of the taking. The court agrees with defendant: The issue on defendant's motion is whether plaintiffs hold a compensable property interest.

To make this determination, the court must evaluate plaintiffs' " 'bundle of rights' " as of the time they acquired the property at issue, which, at the earliest, in this case occurred in 1976. Lucas, ---U.S. at----, 112 S.Ct. at 2899; Preseault, 27 Fed.Cl. at 87. The court must also examine " " 'existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) Amendments.' " Lucas, --- U.S. at ----, 112 S.Ct at 2901 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct 2701, 2709, 33 L.Ed.2d 548 (1972)) (emphasis added; citations omitted); see Preseault, 27 Fed.Cl. at 87 (ruling that Lucas' approach for determining the existence of compensable property interest applied to cases concerning regulations that cause or authorize physical invasions).

3. Compensable property interest

[7] This case, which involves multiple federal

projects, [FN9] multiple benefits, and multiple *786 causes, is sui generis. Generally, the case involves a situation wherein the Federal Government performed various public works projects, including erecting levees in the Mississippi River area. Although the levees had the intended benefit of halting the continued flooding of the Mississippi River, they had the unintended effect of increasing the salinity level in the marsh lands of the Breton Sound Basin. The increased salinity resulting from the levee projects caused the zone favorable for oyster growth to move inland over the years, thereby creating areas favorable for oyster growth. Prior to 1960 the same areas were too fresh to sustain such growth.

FN9. Although the state contributed 25 percent of the overall costs of the Caernarvon project, the project, for purposes of this case, was federal in nature. See Vuljan v. Board of Comm'rs of the Port of New Orleans, 170 So.2d 910, 912-13 (La.Ct.App.), writ refused by 247 La. 616, 172 So.2d 701 (1965).

Plaintiffs do not dispute that the salinity in the marsh lands increased primarily because of federal levee projects and canal work undertaken by private industry. Plaintiffs even admit that the 'saltwater intrusion ... was largely due to the vast systems of levees which Defendant itself constructed....' [FN10] Plfs' Br. filed' May 2, 1995, at 26. Plaintiffs also admit that the areas they leased were too fresh prior to 1960 for oysters.

FN10. While plaintiffs assert that the unintended effect of salinity resulted 'largely' from federal levee projects, Plfs' Br. filed May 2, 1995. at 26, the court notes that defendant refers to both state and federal efforts in the area of flood control. To give plaintiffs the benefit of 'all applicable presumptions, inferences, and intendments,' H.F. Allen Orchards, 749 F.2d at 1574, the court adopts

plaintiffs' characterization that the Federal Government largely was responsible for the unintended benefit of salinity.

Defendant argues that regardless of how the court characterizes the taking allegedly resulting from the operation of the Caernarvon project, plaintiffs hold no 'property right in the maintenance of artificially high salt water in the area of the[ir] leases." [**FN11**] Defs Br. filed May 31, 1995, at 1. Defendant's argument is premised on the notion that plaintiffs hold no compensable property interest in the value of their leases, given the congressional authorization of freshwater diversion structures in 1965. This argument implicates the decision in Preseault, which held that federal law inherently limited the expectancy of an owner of a reversionary interest in a railroad easement.

FN11. In their complaint and additional proposed findings of fact submitted pursuant to RCFC 56(d), plaintiffs contend not only that the Caemarvon project adversely affected salinity levels, but also that the project caused silt deposition on their oyster beds, destroying their harvests. Defendant disputes plaintiffs' characterization, maintaining that plaintiffs' leases could not have been affected by silt deposits because the evidence demonstrates that silt falls out before the 5 ppt. isohaline level.

Although the parties dispute the issue of siltation, it will not preclude entry of judgment on defendant's motion. RCFC 56(d)(1) requires the proponent of a proposed finding (here plaintiffs offered this fact as an additional proposed finding under RCFC 56(d)(1) to provide appropriate substantiation. Plaintiffs advance the siltation phenomenon as a fact, yet proffer no support. Sec RCFC 56(dXl) ('Each paragraph shall contain citations to the opposing part)'s pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.").

[8] Prescault is distinguishable from the instant case because in the former the landowner was subject to both the state and federal regulatory systems, which historically had been intertwined. Given the historical relationship of the regulatory programs, it was appropriate for the court to look to federal law in defining the landowners' property rights. In contrast, the nature of the property interest in this case does not hinge on federal law. The interest is defined solely by state, not federal, law. For purposes of state law, a leasehold interest is generally recognized as a property interest. Lewis Blue Point Oyster, 229 U.S. at 87, 33 S.Ct. at 680; see 767 Third Ave. Assoc. and Sage Realty Corp. v. United States, 48 F.3d 1575, 1578 n. 2 (Fed.Cir. 1995) (individual's right to income under lease constitutes property for purposes of Fifth Amendment) (citing cases).

Alternatively, defendant argues that even though a lease generally gives rise to a property interest--in that it is alienable, descendible, and renewable as of right--plaintiffs *787 hold no compensable property interest because of the nature of the res that is being leased. Relying first on the provisions of the state leases, defendant asserts that plaintiffs hold no compensable expectancy in the continued salinity of the waters above their leased grounds. Defendant correctly contends that the terms of the leases define plaintiffs' property rights under state law. According to defendant, although the state leased certain submerged acreage to individuals, such as plaintiffs who farm oysters, the state guaranteed neither the continued salinity level of the waters above the leased grounds, nor the continued fertility of the leased lands for oyster growth.

Plaintiffs concede that "the leases themselves do not purport to warrant the quality of water over the leases nor guarantee that the leases will not be subject to state and federal efforts to protect natural resources...." Plfs' Br. filed May 2, 1995, at 23 (emphasis added). **[FN 12]** Plaintiffs have not placed into the record copies of any lease agreements which would indicate anything to the contrary. In light of plaintiffs' admission, the court concludes that, based on state law, plaintiffs hold no compensable expectancy in the salinity of the waters above their leased acreage, which rendered their lands fertile.

FN12. The quoted sentence concludes: "[H]owever, the leases need not contain a guarantee that the federal government will pay just compensation to the leaseholder should the lease be destroyed—the Fifth Amendment guarantees plaintiffs this cause of action." Plfs' Br. filed May 2, 1995, at 23. While the court agrees that plaintiffs are not prohibited from pursuing a claim for just compensation under the Fifth Amendment, plaintiffs' admission undercuts their right to compensation, because the admission pertains to whether plaintiffs possess a compensable property interest, a necessary component of a viable takings claim. See supra pp. 784-86.

Notwithstanding plaintiffs' admission, defendant further argues that plaintiffs cannot hold a property right in the artificial, non-historical condition of salinity above their leased grounds. This is so, defendant continues, because the federal levee projects in large part caused the salinity, and the artificial condition consistently had been recognized by local, state, and federal governments as both injuring the oyster industry and as requiring remediation in order to restore habitats favorable to oysters and waterfowl. Thus, according to defendant, plaintiffs have no compensable

property interest in the existence or maintenance of the artificial condition that fostered oyster growth; the condition inhered in the nature of plaintiffs' interest.

According to defendant, plaintiffs, at best, have an unwarranted benefit from a flood control project, not a property right It is well established that a lessor in creating a leasehold cannot convey rights to the lessee which the lessor itself does not possess. In this case the salinity level in the area of plaintiffs' leases, and the corresponding fertility of that acreage, occurred primarily as a result of federal levee projects. **[FN 13]** If the state possessed no vested interest against the Federal Government in the saline condition of the waters, plaintiffs derivatively cannot claim such an interest.

FNI3. See supra note 10.

The issue, a question of first impression, devolves to whether plaintiffs have a vested right, derived from the state, in an unintended benefit resulting from a federal government project, such that cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment. The court holds that the state acquired no vested interest in the salinity of the waters above the leased grounds and that therefore plaintiffs cannot claim such an entitlement. The court does not rule, as defendant argues, that a landowner can never have a compensable property interest in an artificial condition.

Although afforded the opportunity in briefing and during argument to address this issue, plaintiffs proffered no

reply. Plaintiffs' only evidence of a compensable expectancy was that the oyster industry was an important and historic industry in Louisiana. See Transcript of Proceedings, Albert J. Avenal, Jr., et al. v. United States, No. 94-261L, at 31-32 (Fed.Cl. July 18, 1995) ("And with regard to compensable expectancy, I can tell you that Louisiana certainly has depended *788 upon the oyster farmers for the last 30 or 40 years. Louisiana produces over half ... of all the oyster production in the United States....").

4. The unintended effects of a federal government project

Defendant relies on Allain-Lebreton Co. v. Department of Army, 670 F.2d 43 (5th Cir. 1982), to support its argument that plaintiffs cannot claim a property right in an unintended benefit resulting from a federal government project In Allain a company alleged that the Corps' decision not to locate a hurricane protection levee on a certain portion of its lands constituted a taking of its property. The company argued that but for the Corps' veto, the levee district would have approved the proposed easement for the levee. The court held that a decision not to take certain property does not interfere with property rights and that therefore no compensation was due. The refusal to take merely denied the company of a business opportunity and the Federal Government need not pay for such lost opportunities. Allain does not support defendant's theory since the Federal Government took no property in that case. In contrast, the Caernarvon project allegedly interfered with plaintiffs' oyster farming by adversely affecting the salinity level, thereby allegedly effecting a physical taking.

The case law provides some guidelines, but not direct authority. The issue of whether plaintiffs hold a vested right in the unintended benefit of salinity in the area of their leases resulting from the Federal Government's levee projects can be analogized loosely to the issue of whether welfare recipients hold a substantive property right in the entitlements rendered pursuant to government programs. It is well established that recipients of benefits under government entitlement programs do not possess a substantive property right in the continuation of those benefits for purposes of the Fifth Amendment. Sec Bowen v. Gilliard, 483 U.S. 587, 604-05, 107 S.Ct. 3008, 3018-19, 97 L.Ed.2d 485 (1987); Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-57, 30 L.Ed.2d 231 (1971); Allred v. United States, 33 Fed.Cl. 349, 356 (1995); see also Hoffman v. City of Warwick, 909 F.2d 608, 616 (1st Cir.1990) ("Noncontractual employee benefits that a recipient has not yet received, but has a mere expectation of receiving, are not property as to which the government, before repealing, must provide just compensation...."') (citations omitted); Gattis v. Gravett, 806 F.2d 778, 780 (8th Cir.l986) ('[T]he
legislature which creates a statutory entitlement (or other property interest) is not precluded by having done so from altering or terminating the entitlement by subsequent legislative enactment."); Zucker v. United States, 758 F.2d 637, 640 (Fed.Cir.) ("[A] 'government fostered expectation' that retirees will be provided retirement annuities which will not be ravaged by inflation..., does not rise to the level of 'property protected by the takings clause."'), cert. denied, 474 U.S. 842, 106 S.Ct. 129, 88 L.Ed.2d 105 (1985).

In this case the Federal Government created a

benefit for plaintiffs, albeit an unintended one. Both parties admitted during argument that but for the Federal Government's levee construction, oyster growth in the area of plaintiffs' leases would not have occurred, because the area was too fresh to sustain such growth. In 1965 Congress authorized construction of freshwater diversion structures in the Breton Sound Basin in an effort to rectify the salinity problems resulting from its prior public works projects.

It could be observed that just as recipients of federal government entitlement programs have no vested right in the continuation of the benefits conferred pursuant to those programs, plaintiffs have no vested right in the benefit of continued salinity of the waters above their leased grounds. See Allred, 33 Fed.Cl. at 356 ("[A]ny right of the plaintiffs in the 1HS health care benefits is merely procedural in nature, and does not constitute property for the purposes of the Takings Clause."). The court acknowledges that the analogy to the entitlement programs is not conclusive: In this case although the Federal Government created and withdrew the benefit of salinity, the state independently created the leasehold interests. Moreover, the analogy is not exact in that the issue in this case concerns not only whether plaintiffs ever acquired a compensable interest in the artifcial condition of salinity.

Another line of cases that is loosely analogous deals with the relative benefits doctrine. That doctrine espouses that if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities

in substance take nothing from the landowner....' United States v. Sponenbarger, 308 U.S. 256, 266- 67, 60 S.Ct. 225, 229, 84 L.Ed. 230 (1939) (emphasis added); see Laughlin v. United States, 22 Cl.Ct. 85, 111 (1990), affd, 975 F.2d 869 (Fed.Cir. 1992) (Table). The relative benefits doctrine is inapplicable since it requires both an examination of the relative benefits and detriments of the Government's conduct in relation to a landowners' specific parcel and extensive factual determinations. The parties agree that facts bearing on relative benefits are contested and not ripe for adjudication. In addition, unlike most relative benefits cases, this case involves two discrete federal projects. However, although the doctrine cannot be applied, some of its underlying concepts are instructive. For example, the Court in Sponenbarger, stated:

> An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect. In the very nature of things the degree of flood protection to be afforded must vary...

308 U.S. at 265, 60 S.Ct. at 228. Implicit in the Court's pronouncement is that the degree of flooding varies over time. Similarly, the degree of salinity varies over time. Salinity is not a stable characteristic of water', instead, it is subject to the vicissitudes of nature.

With this acknowledgment that the case law is of

marginal assistance, the court turns to the facts surrounding the properties at issue. See United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958) (holding that decision of whether governmental action constitutes taking for purposes of Fifth Amendment must be based on particular facts of each case); see also Penn Cent., 438 U.S. at 124, 98 S.Ct. at 2659 (ruling that Fifth Amendment takings claims are unique to individual landowner). Specifically, the court focuses on the nature of the federal government-conferred benefit and the Federal Government's recognition of the nature of that benefit for purposes of determining whether the state, and plaintiffs derivatively therefrom, acquired a property interest in the salinity of the waters above plaintiffs' leased grounds.

Defendant characterizes the benefit in this case as being 'akin to ... a nuisance," which the Caernarvon project was designed to abate. Defs Br. filed Feb. 7, 1995, at 35. Although the court is not in a position to find that the salinity problem is a nuisance, defendant correctly contends that the record shows that the increased salinity resulting from the federal levee projects always had been viewed as problematic and detrimental to oyster farming. **[FN14]** Plaintiffs do not dispute this fact. The state even viewed saltwater intrusion as a menacing situation. As of the 1940s, the state, particularly concerned about the massive oyster mortality that had rendered several acres of formerly productive private lease and state seed grounds unusable, initiated various studies to identify solutions to the problem.

FN14. If the increased salinity had constituted a nuisance under state law, the situation could have been remedied by the state gov-

ernment at any time pursuant to state nuisance law. See Lucas,-- U.S. at -- - --, 112 S.Ct. at 2899-901. Because defendant has not sustained its burden on summary judgment of establishing a nuisance as a matter of fact and law, the court places no reliance on the nuisance doctrine.

The Federal Government did not acknowledge affirmatively the adverse, unintended effects of its public works projects until the Fish and Wildlife Service issued the 1959 memorandum. Formal acknowledgment of *790 these effects occurred in 1965, when Congress authorized the construction of freshwater diversion structures in the Breton Sound Basin.

Plaintiffs do not dispute that the areas over their leased lands were too fresh to sustain oyster growth as of 1960. Although it is unclear when those lands became fertile for oyster growth, the 1959 memorandum evidences that as of 1959 the Federal Government had recognized the adverse effects associated with its levee projects and had announced its freshwater diversion program 'to re-establish natural patterns of salinity' in the Breton Sound Basin. In defining the northwest landward end of the Basin, i.e., Area No. 4, as too fresh to sustain oyster growth, the 1959 memorandum stipulates that the diversion projects for that area were designed 'to prevent and push back salt- water intrusion.' Thus, as of 1959,the Federal Government recognized both the aberrant nature of salinity and the need to prevent saltwater intrusion in the upper landward end of the Basin; this recognition occurred prior to the time when the area could sustain oyster growth.

Even assuming that some oyster growth occurred

between 1960 and 1965, when Congress formally adopted the 1959 memorandum and its recommendations, the salinity in the northwest landward end of the Basin, the area of plaintiffs' leases, lasted for, at most, five years. The fact that such area was salinated for a maximum of five years prior to the Federal Government's formal recognition of the adverse consequences associated with its prior levee projects does not enhance the position that the state acquired a vested right in that salinity level. **[FN15]**

FN15. During argument, plaintiffs proffered that the inland movement of salinity occurred gradually over about 90 years. Although plaintiffs are correct, takings jurisprudence dictates that the facts and circumstances surrounding the specific properties at issue be examined. The record reflects that prior to 1960, the areas leased by plaintiffs, as well as those leased by the 800-plus putative plaintiffs, were too fresh to sustain oyster growth.

The court holds that the state acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds. Plaintiffs therefore also hold no compensable expectancy in the salinity. Accordingly, in certain limited circumstances, the Federal Government can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment. Specifically, compensation is not required in this case because the benefit conferred historically had been considered problematic and artificial, and because the Federal Government had recognized the problem and taken steps to ameliorate the situation, at the latest five years, after the occurrence of salinity in the northwest landward end of the Basin.

This result is particularly appropriate given the nature of salinity, which, like silt, is subject to the vicissitudes of nature. The Court of Claims reached a similar result in A-B Cattle Co. v. United States, 223 Ct.Cl. 514,621 F.2d 1099 (1980), wherein a corporate landowner and its stockholders alleged a taking based wholly on the theory that they had a property right to silty water. The court based its holding on the state supreme court's ruling that the landowner had no property right in silty water. Given that pronouncement by the state court, the Court of Claims held: 'The law of eminent domain does not allow compensation for losses of expected benefits from outside the property, not identified as property tights. An example is fish in the sea.... The expectation of traffic on a public street, outside retail premises, is a second example.' A-B Cattle, 223 Ct.Cl. at 524, 621 F.2d at 1104 (citation omitted). Salinity may be construed as a benefit outside the property, like fish in the sea, and therefore compensation is not warranted.

[9] Although the record does not identify the dates on which plaintiffs acquired their leasehold interests, the court rules that, notwithstanding the above analysis, any plaintiff who acquired a lease that included the provision holding the state harmless against any losses sustained as a result of freshwater diversion structures lacks a compensable property interest, because the state lease serves as an inherent limitation on that plaintiffs rights. The record indicates that between 1988 and 1990, the Louisiana Wildlife and Fisheries Commission inserted the hold -*791 harmless clause in all leases. Plaintiffs do not dispute this fact.

[10] The court agrees with plaintiffs that the nature

of the governmental action in this case more closely resembles a physical, as opposed to regulatory, taking, but concludes that further inquiry is unnecessary given that plaintiffs hold no compensable property interest. [FN16] In addition, the court rules that plaintiffs' alleged temporary takings' argument concerning the increased seasonal closures resulting from heightened levels of fecal coliform due to the Caernarvon project fails, given that plaintiffs had no compensable expectancy in the artificial condition which spawned oyster communities in the areas of plaintiffs' leases.

FN 16. The court notes that the factual disputes identified above in the recitation of facts are not material to the disposition of this case, but are included solely to provide background. These disputes all concern issues of notice, such as whether the estimates made by defendant's experts concerning salinity ranges differed from actual estimates obtained following operation of the Caernarvon project. These disputes do not affect the ultimate issue of whether plaintiffs have a compensable property interest.

The issue of notice has caused considerable confusion in the area of takings jurisprudence. The confusion exists primarily between what constitutes a compensable property interest and what constitutes reasonable investment-backed expectations for purposes of the three-pronged inquiry relevant to regulatory takings. See, e.g., 767 Third Ave. Assoc., 48 F3d at 1582 (discussing reasonable investment-backed expectations, but concluding that "[t]he government ... did not take any property interest of Sage. Sage merely had an expectation of future income from rent payments....") (emphasis added). Notice is relevant only for the latter. The former requires an analysis of whether a certain right inheres in one's title to the property.

Defendant exhibits this confusion when it cites Ciampitti v. United States, 22 Cl.Ct. 310, 320-22 (1991), and 767 Third Ave. Assoc., for the proposition that plaintiffs lacked a compensable property interest. These cases discussed only reasonable investment-backed expectations. If the reasonable investment-backed expectations

prong of the three-part regulatory takings analysis were intended to involve the same analysis as the compensable expectancy inquiry, the investment-backed expectations prong would be rendered superfluous. Cf. 767 Third Ave. Assoc., 48 F.3d at 1579-83; Broughton Lumber Co. v. United States, 30 Fed.Cl. 239, 243 (1994); Ciampitti, 22 Cl.Ct. at 320-22.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted. The Clerk of the Court shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

No costs.

END OF DOCUMENT

APPENDIX G

28 USCA s 1738.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX H

USCA CONST Art. IV s 1

Section 1. Full Faith and Credit

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

APPENDIX VOLUME II
Appendix I - Appendix M

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APPENDIX I

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX J

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS. P. BARTHELEMY, GARY BARTHELEMY, NEAL BESHEL, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH BURAS, RALPH J. BURAS, JR., RICHARD BURAS, DONALD J. CAMPO, DONALD J. CAMPO, JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILIC, RICHARD H. CLARK, CLEAR WATER OYSTERS, CRESCENT OYSTERS, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR. ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCADE SEAFOOD, INC., M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, DANIEL R. FERNANDEZ, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, DALE E. FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE 0. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M.J. FRANICEVICH, ESTATE OF

FRANK GANIER, GULF INC., *
MICHAEL GUTTUSO, ABRAHAM *
HARNESS, MORRIS HARVEY, *
NATHAN G. HARVEY, HOWARD HINGLE, *
LAURIE A. DUPLESSIS HOLIDAY, *
HERMAN ISADORE, JR., J & P *
OYSTERS, INC., ESTATE OF MAYO P. *
JONES, JR., ROBERT N. KEENAN, *
DONALD J. KENNAIR, JR., RALPH *
KIEFF, RALPH J. KIEFF, JR., *
JOSEPH LABRUZZO, ARTHUR L. *
LAFRANCE, JOEY G. LATAPIE, *
CLIFFORD LEBOUEF, JEAN LEBOUEF, *
LINDY LEBOUEF, LORNE LEBOUEF, *
ANTE LEPETICH, NATO LEPETICH, *
JOHN MARTINEZ, MEDERIC R. MEYER, *
MATTHEW DAVID MEYERS, MITCHEL *
MEYERS, ALLAN C. MOLERO, JR., *
JANET MOLERO, JR., ELENORA NOOK, *
CLADMON NARCISSE, FELIX NARCISSE, *
OLIVER B. NARCISSE, NICOLAE *
NITICA, OYSTER FISHERIES, INC., *
CURT PANNAGL, PATTI PANNAGL, *
RICHARD PATTERSON, PEAN, INC., *
JOSIP PIACUN, MARINKO PIACUN, *
PASKO PIACUN, ANTON N. POPICH, *
ARTHUR A. REDDICK, JR., ARTHUR A. *
REDDICK, KEVIN JOSEPH REDDICK, *
JOHN DWIGHT RILEY, VAN ROBIN, *
ADAM SERIGNE, LIONEL R. SERIGNE, *
O'NIEL N. SERIGNE, PHILLIP H. *
SIMMONS, HELEN T. SKANSI, NICK L. *
SKANSI, FRANK SLAVICH, JR., TACO, *
INC., ANN S. TESVICH, FRANCES LYNN *
TESVICH, IVO A. TESVICH, JOHN A. *

TESVICH, KUZMA *
TESVICH, LISA K. TESVICH, MARIA *
TESVICH, NEDO TESVICH, *
PETER J. TESVICH, PETER L. TESVICH, *
TESVICH OYSTERS, INC., CHARLIE *
THOMPSON, STEVE THOMPSON, JOSEPH *
TINSON, TINSON SEAFOOD COMPANY, *
NIKOLA ANTE VEKIC AND *
NIKOLA ZARAK *
*
Plaintiffs *
*
VERSUS *
*
UNITED STATES OF AMERICA, *
*
Defendant
****

COMPLAINT – CLASS ACTION
No. 94-261 L
Filed Apr 26, 1994

COMPLAINT

NOW INTO COURT, through undersigned counsel, come plaintiffs, ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS P. BARTHELEMY, GARY BARTHELEMY, NEAL BESHEL, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS, JR., RICHARD BURAS, DONALD J. CAMPO, DONALD J. CAMPO, JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILIC, RICHARD H. CLARK, CLEAR WATER OYSTERS, INC.,

CRESCENT OYSTERS, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSPEH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, DANIEL R. FERNANDEZ, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE 0. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M.J. FRANICEVICH, ESTATE OF FRANK GANIER, GULF QUALITY, INC., MICHAEL GUTTUSO, ABRAHAM J. HARNESS, MORRIS HARVEY, NATHAN G. HARVEY, HOWARD HINGLE, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC., ESTATE OF MAYO P. JONES, JR ROBERT M. KEENAN, DONALD J. KENNAIR, JR., RALPH J.KIEFF, RALPH J. KIEFF, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, ALLAN C. MOLERO, JR., JANET MOLERO, ELENORA MOOK, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, OYSTER FIS HERIES, INC., CURT PANNAGL, PATTI PANNAGL, RICHARD PATTERSON, PEAN, INC., JOSIP PIACUN, MARINKO PIACUN, PASKO PIACUN, ANTON N. POPICH, ARTHUR A. REDDICK, JR. , ARTHUR A. REDDICK, KEVIN JOSEPH REDDICK, JOHN DWIGHT

RILEY, VAN ROBIN, ADAM R. SERIGNE, LIONEL R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, TINSON SEAFOOD COMPANY, NIKOLA ANTE VEKIC AND NIKOLA ZARAK, for themselves and all other members of the class hereinafter described, who allege as follows:

JURISDICTION

1.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. 1491, et seq., and the Fifth Amendment of the United States Constitution which prohibits the taking of private property without just compensation.

PLAINTIFFS AND PROPOSED CLASS REPRESENTATIVES

2.

The named plaintiffs and proposed class representatives, and all other members of the class hereinafter described, are residents of the State of Louisiana.

DEFENDANT

3.

Made defendant herein is the United States of

America through its agencies including but not necessarily limited to the United States Army Corps of Engineers.

FACTUAL ALLEGATIONS

4.

In or about the Spring of 1988, defendant, through the United States Army Corps of Engineers, commenced construction of the Caernarvon Freshwater Diversion Project, as authorized on October 27, 1965 , by Public Law 89-298, of the Eighty-ninth Congress, First Session. Construction of the Caernarvon structure was completed in or about the Fall of 1991.

5.

The stated purposes Caernarvon Project not limited to, the enhancement of emergent marsh vegetation growth and the reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas.

6.

When the freshwater diverted from the Mississippi reaches the waterbottoms leased by plaintiffs from the State of Louisiana, it dilutes the sa linity of the waters and deposits silt on the waterbottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as, the increased vegetation- and bacteria on or near the water bo;ttoms wherein plaintiffs' Leases are located, and the silt deposits, the productivity of plaintiffs' leases

has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs" leases are located make plaintiffs' leases no longer capable of oyster growth and cultivation.

7.

The hereinabove described actions of defendant have resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.

8.

Defendant has not instituted any condemnation proceeding to acquire all or any part of plaintiffs' land, nor has defendant paid or offered to pay to plaintiffs any amount for the damages inflicted upon their oyster leases.

THE CLASS

9.

This action is brought and may properly be maintained as a class action pursuant to provisions of Rule 23 of the Rules of the United States Court of Federal claims. Plaintiffs bring this action on behalf of themselves and all others similarly situated as representative members of the following proposed class:

All individuals, partnerships, corporations, etc, owning oyster farming leases in the State of Louisiana which leasehold interests were destroyed or otherwise adversely affected by the actions of the United States

government known as the Caernarvon Freshwater Diversion Project, as more fully explained below.

NUMEROSITY
10.

The proposed class is so numerous that the individual joinder of all of its members is impracticable. The exact number of members of the class is not known, but it estimated that there are not less than ONE THOUSAND (1,000). members.

COMMON QUESTIONS OF LAW AND FACT
11.

There are common questions of law and fact in the action that relate to and affect the rights of each member of the class and the relief sought is common to the entire class, namely, whether the destruction of plaintiffs' oyster leases constitutes a compensable taking within the meaning of the Fifth Amendment of the United States Constitution.

TYPICALITY OF CLAIMS
12.

Plaintiffs' claims are typical of the claims of the members of the class. Plaintiffs and all- members of the class sustained a loss of property arising out of defendant's conduct as explained herein.

FAIR AND ADEQUATE REPRESENTATION
13.

Plaintiffs will fairly and adequately protect the interests of the members of the class. They have retained attorneys

experienced and capable in class action and in litigation of oyster damage claims. There is no conflict between any individual named plaintiff and other members of the class with respect to this action, or with respect to the claims for relief set forth herein.

RISK OF VARYING ADJUDICATIONS
14.

This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which as a. practical matter would be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interest.

GOVERNMENT HAS ACTED ON GROUNDS
GENERALLY APPLICABLE TO CLASS
15.

The United States has acted or refused to act, as alleged mor specifically below, on grounds which are generally applicable to the entire class.

SUPERIORITY OF PROCEEDING
AS A CLASS ACTION
16.

A class action is superior to other available methods for the fair and efficient adjudication of this litigation, since individual joinder of all members is impracticable. Even if class members could afford individual litigation, it would be unduly burdensome to the Courts in which the

individual litigation would proceed. Individual litigation in this matter would magnify the delay and expense to all parties in the court system. The class action device presents fewer management difficulties and provides the benefit of unitary adjudication, economy of scale and comprehensive supervision by a single court.

RELIEF SOUGHT
17.

Plaintiffs request a judgment of this court in their favor and against defendant as follows:

a. That in due course this matter be certified as a class action with an "opt-out" designation;

b. For damages as occasioned by the loss in future profits from the sale of oysters from plaintiffs' leases;

C. For damages as occasioned by the loss of past investment in their leasehold interests;

d. For legal interest on all amounts due from the date of the taking until paid;

e. For recovery of plaintiffs' reasonable costs, disbursements, and expenses, including attorneys' fees, damage appraisals, and expert fees actually incurred because of this proceeding, in accordance with 28 U.S.C. 1.491 and 42 U.S.C. 4654; and,

f. For all general and equitable relief

Respectfully submitted,

ST. MARTIN, LIRETTE, SHEA,
WATKINS & MCNABB, APLC

/s/ Michael St. Martin

MICHAEL ST. MARTIN
CAROLYN A. MCNABB
Attorneys for Plaintiffs
3373 Little Bayou Black Road
Houma, Louisiana 70:361-2017
Telephone (504)876-31391

Signed this 22nd day of April, 1994

PLEASE SERVE THE UNITED STATES OF AMERICA THROUGH DELIVERY TO THE ATTORNEY GENERAL IN ACCORDANCE WITH RUSCFC 4

APPENDIX K

25TH JUDICIAL DISTRICT COURT FOR
THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION B

ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY, CHRIS P. BARTHELEMY, GARY BARTHELEMY, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS JR., RICHARD BURAS, DONALD J. CAMPO JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILICH, RICHARD H. CLARK, CRESCENT OYSTER, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE. E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE O. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX,
FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M. J. FRANICEVICH, ESTATE OF, FRANK GANIER, ABRAHAM J. HARNESS, NATHAN G. HARVEY, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC.,

ESTATE OF MAYO P. JONES, JR., ROBERT M. KEENAN, DONALD J. KENNAIR, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, RICHARD PATTERSON, PEAN, INC., IVO N. POPICH, ANTON N. POPICH, ARTHUR A. REDDICK, ADAM R. SERIGNE, LIONEL R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, AND NIKOLA ANTE VEKIC

VERSUS

THE STATE OF LOUISIANA
DEPARTMENT OF NATURAL RESOURCES
PETITION FOR DAMAGES - CLASS ACTION
FILED March 29, 1994

NOW INTO COURT, through undersigned counsel, come plaintiffs, who respectfully represent:

I.

Plaintiffs, ALBERT J. AVENAL, JR., ANTHONY BARTHELEMY CHRIS P. BARTHELEMY, GARY

BARTHELEMY, ANNA BUTSCHER BURAS, ANNA BESSIE BODDEN BURAS, NEAL BURAS, RALPH J. BURAS, RALPH J. BURAS JR., RICHARD BURAS, DONALD J. CAMPO JR., DONALD P. CAMPO, ERNEST CAMPO, MATHILDA GUERRA CAMPO, ESTATE OF TONY CAMPO, ANNA CIBILICH, PERO CIBILICH, RICHARD H. CLARK, CRESCENT OYSTER, INC., IRVIN CROSS, ESTATE OF JOSEPH CROSS, MELVIN CROSS, CLARENCE R. DUPLESSIS, CLARENCE R. DUPLESSIS, JR., ARTHUR ENCALADE, CARLISS J. ENCALADE, ESTATE OF JOSEPH ENCALADE, STANLEY ENCALADE, ENCALADE SEAFOOD, INC., M.J. FARAC, M.J. FARAC, JR., MAJA FARAC, SINAJKA FARAC, ANN P. FOX, CALVIN R. FOX, CALVIN R. FOX, JR., DALE. E. FOX, GENE L. FOX, JUSTIN RYAN FOX, KENNETH A. FOX, KENNETH RYAN FOX, MARIE O. FOX, RACHEL FOX, RHONDA FOX, RODNEY FOX, JR., RODNEY L. FOX, ROSS LOUIS FOX, FOX INDUSTRIES, FOX OYSTER CO., INC., FOX SEAFOODS, INC., ESTATE OF M. J. FRANICEVICH, ESTATE OF, FRANK GANIER, ABRAHAM J. HARNESS, NATHAN G. HARVEY, LAURIE A. DUPLESSIS HOLIDAY, HERMAN ISADORE, JR., J & P OYSTERS, INC., ESTATE OF MAYO P. JONES, JR., ROBERT M. KEENAN, DONALD J. KENNAIR, JR., JOSEPH LABRUZZO, ARTHUR L. LAFRANCE, JOEY G. LATAPIE, CLIFFORD LEBOUEF, JEAN LEBOUEF, LINDY LEBOUEF, LORNE LEBOUEF, ANTE LEPETICH, MATO LEPETICH, JOHN MARTINEZ, MEDERIC R. MEYER, MATTHEW DAVID MEYERS, MITCHEL MEYERS, CLADMON NARCISSE, FELIX NARCISSE, OLIVER B. NARCISSE, NICOLAE NITICA, RICHARD PATTERSON, PEAN, INC., IVO N. POPICH, ANTON N. POPICH, ARTHUR A. REDDICK, ADAM R. SERIGNE, LIONEL

R. SERIGNE, O'NIEL N. SERIGNE, PHILLIP H. SIMMONS, HELEN T. SKANSI, NICK L. SKANSI, FRANK SLAVICH, JR., TACO, INC., ANN S. TESVICH, FRANCES LYNN TESVICH, IVO A. TESVICH, JOHN A. TESVICH, KUZMA I. TESVICH, JR., ESTATE OF KUZMA J. TESVICH, LISA K. TESVICH, MARIA TESVICH, NEDO TESVICH, PETER J. TESVICH, PETER L. TESVICH, TESVICH OYSTERS, INC., CHARLIE THOMPSON, STEVE THOMPSON, JOSEPH TINSON, AND NIKOLA ANTE VEKIC, all residents of or conducting business in Plaquemines and St. Bernard Parishes, bring this action on their own behalf and on behalf of others similarly situated in the respects described below.

II.

This is a class action brought pursuant to La.C.C.P. art. 591 et. seq., on behalf of all individuals, partnerships, corporations and entities that currently own or have owned oyster leases located within the parishes of Plaquemines and St. Bernard that have been damaged as a result of the actions of the State of Louisiana, acting by and through the Department of Natural Resources, in diverting fresh water from the Mississippi River through the Caernarvon Freshwater Diversion Project into these areas where plaintiffs' oyster leases are located. The freshwater diversion resulted in lowered salinity levels and a consequent profusion of certain vegetation in the affected areas, killing the then-extant oysters and rendering the beds unquitable for further cultivation. Plaintiffs seek to recover compensation for the destruction of their leasehold interest which were appropriated for public use by the State of Louisiana through the actions of the Department of Natural Resources.

III.

Made defendants herein are the State of Louisiana and the Department of Natural Resources.

IV.

The State of Louisiana, acting through the Department of Natural Resources, and in conjunction with the United States Army Corps of Engineers, authorized, funded, constructed, and currently operate and maintain the Caernarvon Freshwater Diversion Project. After construction of the Caernarvon Freshwater Diversion Project structure was completed, defendants had the ability to dilute with freshwater the salinity or salt content in the water bottoms where plaintiffs' oyster leases are located. These activities have directly caused the destruction of plaintiffs' leasehold interests, thereby entitling plaintiffs to just compensation.

V.

The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of emergent marsh vegetation growth and the reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are

located, as well as the increased vegetation on or near the water bottoms wherein plaintiffs' leases are located, the productivity of Plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant his resulted in a permanent and substantia interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of, Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.

VII.

Defendant has not instituted any expropriation or condemnation proceeding to acquire all or any part of plaintiffs' land, nor has defendant paid or offered to pay to plaintiffs' any amount for the damages inflicted upon their oyster leases..

VIII.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.

IX.

This action is appropriate for determination through the Louisiana Class Action Procedure (La. C.C.P. art. 591 et seq.) for the following reasons:

a) The large number of claimants present a level of numerosity better handled through the class action procedure as opposed to mass joinder of individual claims.

b) The common issues of law and fact pertaining that relate to and affect the rights of each member of the class and the relief sought, namely, whether the damage of the plaintiffs' oyster leases constitute a compensable taking by the State of Louisiana, predominate over the individual issues or quantum.

c) Requiring the institution of separate lawsuits would pose a serious risk of inconsistent adjudications and earlier separate determinations with a prejudicial effect on subsequent litigants.

d) Prosecution of separate actions would pose a serious threat of substantially impeding the ability of class members to protect their interests.

e) Petitioner's have sustained damages of the nature described above and are suitable representatives for the class.

f) The plaintiff representatives herein are represented by skilled attorneys in the field of oyster damage claims, and have successfully represented claimants in other litigation of this nature and who may be expected to handle this action in an expeditious and economical manner to the best

interests of all the class membership.

g) The class action is a superior procedural vehicle for the fair and efficient adjudication of this controversy, because:

1) The vast majority of the class members have no interest in controlling the litigation;

2) Such a method of proceeding would allow the Court to process all rightful claims in one proceeding;

3) It is desirable to concentrate all the litigation in one forum;

4) Class litigation is manageable considering the opportunity to afford reasonable notice of significant phases of the litigation to class members and permit distribution of recovery.

5) The determination of liability and the basis for the assessment of compensation may be made in the class action under the provisions of La. C.C.P. art. 593.1 (C) (1) (2) and (3), without the necessity of proof at that time as to the amount of those damages, thereby establishing guidelines for settlement and/or subsequent trials in the individual cases if necessary.

X.

Venue is proper in this parish pursuant to Article 74 of the Louisiana Code Of Civil Procedure and La. R.S. 13:5104, as this cause of action arises in Plaquemines Parish, as plaintiffs' leases are located within Plaquemines Parish, and/or because the wrongful conduct of the State

of Louisiana and the Department of Natural Resources occurred within Plaquemines Parish.

WHEREFORE, PLAINTIFFS PRAY that defendants be duly cited to appear and answer this petition; that this matter be ordered to proceed as a class action and that a suitable management plan be implemented pursuant to La. C.C.P. 593 (C); and after all legal delays and due proceeding had, that there be jJudgment in favor of plaintiffs and against defendants for damages, together with legal interest thereon from the date of the taking of an interest in the plaintiffs' property until paid, for all costs of these proceedings and for all general and equitable relief as provided by law.

Respectfully submitted,

/s/ Philip F. Cossich, Jr
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8311 Highway 23, Suite 104
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PLEASE SERVE:

The State of Louisiana
through the Attorney General,
Richard P. Ieyoub
Post Office Box 94005
Baton Rouge, Louisiana 70804-9005

The Department of Natural Resources
State of Louisiana
through its Secretary,
Jack McClanahan
Post Office Box 94396
Baton Rouge, Louisiana 70804-9396

APPENDIX L

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

VERSUS

DEPARTMENT OF NATURAL RESOURCES

FILED: DEC 15 1998 /s/ Becky H. Kaiszeski
DEPUTY CLERK

MOTION FOR SUMMARY JUDGMENT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

NOW INTO COURT, through undersigned counsel, comes Defendant, the State of Louisiana, through the Department of Natural Resources ("DNR"), and moves this Honorable Court for summary judgment on the basis that the Plaintiffs' claims should be dismissed under the equitable doctrine of collateral estoppel, all for the reasons set forth in the attached Memorandum in Support of this Motion.

RESPECTFULLY SUBMITTED,

RICHARD P. IEYOUB
Attorney General

BY: /s/ Andrew C. Wilson
ANDREW C. WILSON - #1162
DONNA M. YOUNG - #20936
Special Assistant Attorneys General
20th Floor, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: (504) 569-21900
and
BURKE & MAYER, Of Counsel
Attorneys for State of Louisiana
Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon all counsel of record by depositing same in the U.S. Mail, postage pre-paid, addressed to them at their offices, this 15th day of December, 1998.

/s/ James Savoy

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

VERSUS

DEPARTMENT OF NATURAL RESOURCES

FILED:_____ /S/BECKY H. KALISZESKI
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RELATED TO COLLATERAL ESTOPPEL

MAY IT PLEASE THE COURT:

On November 12, 1996, the Court of Appeals for the Federal Circuit dismissed the claims originally raised by these same Plaintiffs on the same issues in the Court of Federal Claims, holding that no taking took place.[1] DNR now moves for summary judgment dismissing these same Plaintiffs" claims based upon the same issues under the doctrine of defensive collateral estoppel.

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[1] Avenal v. United States, 100 F.3d 933 (Fd. Cir. 1996).

FACTS

On March 29, 1994, the Plaintiffs in this matter filed the instant class action alleging a taking under the Fifth Amendment of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution of 1974.[2] The Plaintiffs alleged that their oyster leases on State water bottoms had been damaged by the freshwater outfall from the Caernarvon freshwater diversion project. Shortly thereafter, on April 26, 1994, Plaintiffs filed what amounts to a nearly identical lawsuit in the Court of Federal Claims against the United States Army Corps of Engineers ("the Corps").[3] A comparison of the allegations set forth in the Federal Complaint and the Petition filed in the 25th Judicial District Court reveals that the cases deal with the same major issue: Whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure.

For example, paragraph 5 of the Federal Complaint reads as follows:

> 5.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt-water areas.[4]

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[2] Exhibit "A".

[3] Complaint in C.A. No. 94-261 (L) filed 4/26/94 (Exhibit"B").

[4] Exhibit "B".

The State Court Petition reads similarly:

V.

The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.[5]

The sixth paragraph of both pleadings also reads similarly:

6.

When the freshwater diverted from the Mississippi reaches the water bottoms leased by plaintiffs from the State of Louisiana, it dilutes the salinity of the waters and deposits silt on the water bottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as the increased vegetation and bacteria on or near the water bottoms where plaintiffs' leases are located, and the silt deposits, the productivity of plaintiffs' leases has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs' leases are located

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[5] Exhibit "A

makes Plaintiff's leases no longer capable of oyster growth and cultivation.[6]

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are located,, as well as the increased vegetation on or near the water bottoms wherein plaintiffs' leases are located, the productivity of plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant has resulted in a permanent and substantial interference with Plaintiffs' use and enjoyment of their land amounting to a taking of an interest in Plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.[7]

Finally, paragraph 7 of the Federal Complaint and paragraph VIII of the State Petition also read similarly:

7.

The hereinabove described actions of defendant have resulted in permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs'

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[6] Exhibit "B"

[7] Exhibit "A"

taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[8]

8.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[9]

APPLICABLE LAW

Takings Law

Based upon the comparison set forth above, the issue in both cases is whether the freshwater outfall from the Caernarvon freshwater diversion structure has resulted in a taking under constitutional law. Both cases involve a taking under the Fifth Amendment of the United States Constitution. The United States Supreme Court has indicated that the "takings" test acquires that a claimant first demonstrate a compensable property interest, and

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8 Exhibit "B'

9 Exhibit "A"

afterwards the Court then applies three factors involving:

(1) The character of the governmental actions;
(2) The economic impact on the claimant; and
(3) The extent to which the governmental actions interfere with reasonable investment-backed expectations.[10]

The Louisiana takings test consists of the following inquiries:

(1) Whether the property rights have been effected;
(2) Whether the property has been taken or damaged in a constitutional sense; and
(3) Whether the taking or damage is for a public purpose.[11]

In analyzing the second prerequisite of the Louisiana three prong takings test, i.e., in determining whether the property has been taken or damaged in a constitutional sense, the Louisiana Supreme Court draws freely upon jurisprudence interpreting the Fifth Amendment of the United States Constitution and makes direct parallels between the Fifth Amendment of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution.[12]

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10 Penn Central Transp. v. New York City, 483 U.S. 104, 124, 98 S.Ct-2646, 2659 (1978).

11 State through Dep't of Transp. & Dev. v. Chambers Inv Co., 91-1202 (La. 3/2/92) 595 So.2d 598, 603 (La. 1992).

12 See, e.g., Louisiana Seafood Management Counsel v. Louisiana Wildlife and Fisheries Comm'n, 97-1367 (2/29/98) 715 So.2d 387, 391-392.

Accordingly, both the factual and legal issues before the Court in the instant matter are the same.

COLLATERAL ESTOPPEL

The Louisiana Supreme Court has unequivocally stated that when a Louisiana state Court is required to determine the preclusive effects of a judgment rendered by a Federal Court on a federal question, it is federal law which must be applied.[13] As a result, where prior proceedings takes place in Federal Court, the preclusive effect of those prior federal proceedings is an issue of federal law.[14] The Federal rule of preclusion governs any federal judgment, even when the Court renders a decision of state law issues.[15] Accordingly, the preclusive effect of the prior federal judgment in the Avenal federal proceedings is determined according to federal law (the law of the Court issuing the initial decision), regardless of whether the second suit has been filed in state Court.

Although the civil law does not look favorably upon equitable doctrines such as estoppel, federal law specifical-

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13 Reeder v. Succession of Palmer, 92-2965, 92-3002 (La. 9/3/93) 623 So.2d 1268, 1271 (La. 1993), cert. denied, 5 10 U.S. 1165 (1994).

14 Nagle v. Lee, 807 F.2d 435, cert. denied, (5th Cir. 1987); Chemtron Com. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007, cert. denied, 406 U.S. 1013 (1983); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540-41 (5th Cir. 1981); Commercial Box & Lumber Co. v. Uniroyal, Inc., 623 F.2d 371, 373 (5th Cir. 1980); Aerojet General Co. v. Askew, 511 F.2d 710 (5th Cir.), dismissed, 423 U.S. 908, (1975); Restatement (2d) of Judgments Section 87 (1982).

15 Recoveredg L.P. v. Pentecost, 44 F.M. 1284, 1290 n. 11 (5th Cir. 1995.).

ly recognizes a doctrine of collateral estoppel, in fact, defensive collateral estoppel, applicable herein.

Collateral estoppel depends on three elements:

(1) The issue at stake must be identical to the one involved in the prior action;

(2) The issue must have been actually litigated in the prior action; and

(3) The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action.[16]

The United States Supreme Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[17] This is known as defensive collateral estoppel wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[18] Stated succinctly defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[19]

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16 Recoveredge L.P., 44 F.3d at 1290; Sheerin v. Davis, 3 F.3d 113, 114 (5th Cir. 1993).

17 Parklane Hosiery Co., Inc. v. Shore, 439U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

18 Id.

19 Id.

Under the circumstances of the instant matter, DNR can apply the doctrine of defensive collateral estoppel such that the Plaintiffs' claims in these State proceedings should be dismissed in their entirety. First, the takings issue is identical.[20] Second, the takings issue was actually litigated in the Federal Circuit which found there was no taking.[21] Finally, the takings issue was a necessary part of the Federal Judgment. In fact, the decision on the takings issue was the core of the dispute. Accordingly, the doctrine of defensive collateral estoppel requires the dismissal of the Plaintiffs' claims in the instant state litigation as well.

CONCLUSION

Inasmuch as federal law controls on the issue of the preclusive effect of the prior federal decision, DNR submits the doctrine of defensive of collateral estoppel has direct application herein. This doctrine disposes of Plaintiffs' claims in their entirety and, therefore, this litigation should be at an end.

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[20] Flowers v. Phelps, 964 F.2d 400, 401 (5th Cir. 1992) (amended opinion).

[21] Avenal v. United States, 100 F.3d 933, 938 (Fed. Cir. 1996).

RESPECTFULLY SUBMITTED,

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Attorney General

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BURKE & MAYER, Of Counsel
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Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been served upon all counsel of record by depositing same in the U.S. Mail, postage pre-paid, addressed to them at their offices, this 15th day of December, 1998.

/s/ illegible

APPENDIX M

SUPREME COURT OF LOUISIANA

WRIT APPLICATION FILING SHEET

No. 00 CC 1077

ALBERT J. AVENAL, JR., ET AL.,
Plaintiffs-Respondents

VERSUS

THE STATE OF LOUISIANA AND THE,
DEPARTMENT OF NATURAL RESOURCES,
Defendants-Applicants

APPLICATION FOR WRITS OF CERTIORARI OR REVIEW (CIVIL) FROM THE MARCH 15, 2000 DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS,
CIVIL APPEAL NO. 99-C-0127
ON REVIEW FROM THE 25TIl JDC FOR THE PARISH OF PLAQUEMINES, CA. NO.
38-266, DIVISION "Bt'
HONORABLE WILLIAM A. ROE, JUDGE PRESIDING

FILED ON BEHALF OF DEFENDANTS/APPLICANTS
THE STATE OF LOUISIANA AND THE DEPARTMENT OF
NATURAL RESOURCES

EXPEDITED CONSIDERATION AND STAY ORDER REQUESTED

RICHARD P. IEYOUB Attorney General
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and
BURKE & MAYER, of Counsel
Attorneys for The State of Louisiana through the
Department of Natural Resources

April 14, 2000

LOUISIANA SUPREME COURT
CIVIL
PRIORITY FILING SHEET

State of Louisiana, Depaqrtment of Natural Resources
Applicant's Name

1. What is the nature of the priority? Application made by:
PLAINTIFF **DEFENDANT** OTHER (Circle one)

Specify: Pursuant to RULE V1. Section 4, a special assignment is requested on the grounds that tState of Louisiana is a party. Further, this matter is impressed with the public interest, insofar as this matter will have potentially devastating effects on the fiscal status of the State because the ruling of the Fourth Circuit attempts to change the law applicable to actions for inverse condemnation under State Law. If allowed to stand, the ruling will have significant, adverse effects on all governmental action be State, Parish and local government as well as upon the State's efforts to save the State's rapidly disappearing coastal areas.

2. Is a hearing or trial date set? NO **YES**
DATE: **Status Conference on 4/17/00**
TIME: **1:00 p.m.**
Jury trial? NO **YES** Any out of state witnesses? **NO** YES

3. Was relief applied for in the trial court? **NO** YES
By: PLAINTIFF **DEFENDANT**
Stay: **DENIED**/GRANTED Until: _____
Ruling of Dist. Court: **Stay Denied**

Was an application made to the Court of Appeal? **NO**
YES

Which Circuit? 1ST 2ND 3RD **4TH** 5TH
Application was made by: PLAINTIFF
DEFNDANT OTHER
Date of Court of Appeal action: **4/12/00**
Court of Appeal action: **Stay denied**

If you did not apply to the Circuit Court of Appeal state why:

---

5. How and when will applicant be adversely affected if relief is not granted?

Plaintiffs have already requested a Status Conference before the Court has scheduled same for Monday, April 17, 2000, which means a new trial date can be set at any time thereafter. There are numerous discovery issues which will have to be explored in detail on a major level prior to the trial date and there aresix pending writ applications before the Fourth Circuit which may have to be briefed in detail upon consideration by the Fourth Circuit. All of this action may be unnecessary if the Supreme Court should reinstate the Fourth Circuit's original opinion dismissing Plaintiff's claims in their entirety.

6. List of Lead Counsel & Judge involved in case:

Name: Scott LaBarre (Plaintiffs/Respondents)
Home (504) 286-5828
Night Bus ( ) ____
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Name: Andrew C. Wilson (Defendants/Applicants)
Home (504) 737-4405
Night Bud ( ) _____
PHONE#'s -- Day Bus (504) 569-2900

Name:_____
PHONE #s -Day Bus ( ) _____
Dist. Ct. -- Judge: Honorable William A. Roe
PHONE#'s - Bus Day (504) 392-6690

CERTIFICATION

I am requesting Priority consideration of this application. Pursuant to Supreme Court Rule 10. Section 2(e), I have notified all counsel and unrepresented parties by telephone or other equally prompt means of communication that said writ application has been or is about to be filed in this court and that I have served on all parties at interest of their counsel, by a means equal to the means used to effect filing in this court.

/s/ illegible
SIGNATURE

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO. _____

TO BE COMPLETED BY COUNSEL
or PRO SE LITIGANT FILING APPLICATION

TITLE

ALBERT J. AVENAL, JR., ET AL
VS.
THE STATE OF LOUISIANA
THROUGH THE DEPARTMENT
OF NATURAL RESOURCES

Applicant:La. Department of Natural Resources
Have there been any other filings in this
Court in this matter? X Yes ___ No
Are you seeking a Stay Order? Yes
Priority Treatment? Yes
If so you MUST complete & attach a Priority
Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

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Pleading being filed: X In prop. person, In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

X Civil, ___ Criminal, ___ Bar, ___ Civil Juvenile, ___ Criminal Juvenile, ___ Other

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____
Judge/Commissioner/Hearing Officer: _____
Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Plaquemines Parish, 25th JDC Docket Number: 38-266
Judge and Section: Hon. William A. Roe, Div. B
Date of Ruling/Judgment: January 5, 1999

APPELLATE COURT INFORMATION

Circuit: Fourth Filing Date: January 15, 1999 (writ granted, later refused on rehearing)
Docket No. 99-C-0127 Applicant in Appellate Court: State of Louisiana, Department of Natural Resources Ruling Date: March 3, 1999 Panel of Judges: Waltzer, Gulotta, Ciaccio, Klees & McKay En Banc: ___

REHEARING INFORMATION

Applicant: Plaintiffs, Albert J. Avenal, Jr., et al. Date Filed: March 17, 1999 Action on Rehearing: Granted Ruling Date: March 15, 2000 Panel of Judges: Waltzer, Gulotta, Ciaccio, Klees & McKay En Banc: _____

PRESENT STATUS

X Pre-Trial, Hearing/Trial Scheduled dated: status conference set for Monday, April 17, 2000 , _____ Trial in Progress, _____ Post Trial
Is there a stay now in effect? No Has this pleading been filed simultaneously in any other court? No
If so, explain briefly:

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct tot eh best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

/s/ ANDREW C. WILSON

INDEX

Statement of Considerations for the Granting of Writs.....iii

Statement of the Case.....1

A. The Parallel Proceedings in State and Federal Courts Below.....1

B. Ultimate Determination in Federal Court.....4

C. State Court Proceedings to Date.....5

Assignment of Errors.....8

Summary of Argument.....9

Argument.....10

I. The Trial Court and Later the Court of Appeals Should Have Dismissed the Plaintiffs' Claims Under the Doctrine of Collateral Estoppel Pursuant to Applicable Federal Common Law.....10

A. The Preclusive Effect of a Prior Federal Decision Is an Issue of Federal Law.....10

B. Application of the Federal Common Law of Collateral Estoppel Results in the Dismissal of Plaintiffs' Claims.....13

II. The Fourth Circuit's Majorit Opinion Attempts to Eliminate "Investment-Backed Expectations" from Consideration in the Analysis of Inverse Condemnation Claims Contrary to Established Constitutional Precedent.....14

A. "Investment-Backed Expectations" Form the Second Element of the Three Pronged Test for Takings Under Established Constitutional Law.....14

B. The Louisiana Supreme Court and the Lower Courts Have Consistently Applied United States Constitutional Law to Determine Whether a "Taking" Has Occurred in the Context of Inverse Condemnation Jurisprudence.....16

C. "Distinct Investment-Backed Expectations" Are Not Only Relevant, But Also Constitute a Critical and Requisite Consideration for Any Analysis of a "Takings" Claim.....19

III. The Fourth Circuit Erred in Eliminating All Governmental Defenses to a Taking Save for "Bad Faith".....20

A. The Fourth Circuit's Opinion Renders All Louisiana Government Defenseless to "Takings" Claims.....20

B. The Fourth Circuit's Action Renders Recovery On a "Takings" Theory Well-Nigh Automatic.....22

C. To Reach Its Result, The Fourth Circuit Inexplicably Merged the Distinct Concepts of Expropriation and Inverse Condemnation.....23

1. Expropriation.....23

2. Inverse Condemnation.....24

Conclusion.....25

Verification.....26

Appendix.....27

A. Trial Court's Judgment dated January 5, 1999.

B. Original Opinion, CA No. 99-0127 (La.App. 4th Cir. 3/3/99).

C. Opinion on Rehearing, CA No. 99-0127 (3/15/00), ___ So.2d ___ dissent of Judge Miriam Waltzer.

D. Trial Court's Denial of Stay, CA No. 38-266 "B" (4/11/00).

E. Denial of Stay, CA No. 00-0855 (La. App. 4th Cir. 4/12/00).

F. State Petition, CA No. 38-266, 25th JDC, Parish of Plaquemines.

G. Albert J. Avenal, Jr. et al. v. The United States of America, United States Court of Federal Claims, No. 94-261-L.

H. Avenal v. United States, 33 Fed.Cl. 778, 781 (Fed. Cl. 1995).

I. Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

J. Order Granting Certiorari, CA No. 99-0127 (La.App. 4th Cir. 3/26/99).

STATEMENT OF CONSIDERATION FOR THE GRANTING OF WRITS

Pursuant to Rule X, Sections 1 and 3, of the Rules of the Supreme Court of Louisiana, Defendants/Applicants, the State of Louisiana and the Department of Natural Resources (collectively "DNR"), respectfully suggest that this Writ Application presents the following considerations for the granting of writs:

1. The decision of the Fourth Circuit Court of Appeals presents a **direct conflict** with the decisions of several bodies of jurisprudence. Specifically, insofar as the choice of federal common law, the Fourth Circuit's decision conflicts not only with other constitutional law decisions of the **Fourth Circuit**[1] itself, but with constitutional law decisions from the other **Louisiana appellate courts**[2] and the

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1 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141, 142; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989; McCollough v. Dauzat, 98-1293 *3 (La.App. 3rd Cir. 3/3/99), 736 So.2d 914, 915; Schlesinger v. Herzog, 95-1127 *21 (La.App. 4th Cir. 4/3/96), 672 So.2d 701, 714; City of New Orleans v. Badine Land Ltd., 94-2631 *6 (La.App. 4th Cir. 6/29/95), 657 So.2d 770, 773; Tolis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 94-1444 *8 (La.App. 4th Cir. 5/16/95), 655 So.2d 747, 753.

2 Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 192; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439.

Louisiana Supreme Court.[3] The Fourth Circuit's elimination of consideration of a claimant's "distinct investment-backed expectations" in the context of takings law conflicts directly with the body of jurisprudence emanating from **the United States Supreme Court,**[4] **the Louisiana First Circuit Court of Appeals,**[5] **and, the courts of all the other States** that have considered this issue.[6] Insofar as the Fourth

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3 Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654 *14 (La. 1/16/96), 666 So.2d 624, 632-3; Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993); Pilie & Pile v. Metz, 547 So.2d 1305, 1308 (La. 1989).

4 Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Good v. United States, 189 F.3d 1355, 1360 (Fed.Cir. 1999), citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994), cert. denied, 529 U.S. ____, ____ S.Ct. ____ (4/3/00).

5 Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234.

6 See e.g. (1) **Alaska**: State of Alaska v. Arctic Slope Regional Corp., 834 P.2d 134, 139 (Alaska 1991); (2) **Arizona**: Laidlaw Waste Systems, Inc. v. City of Phoenix, 815 P.2d 932, 935 (Ariz.Ct.App. 1991); (3) **California**: Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851, 862-863 (Calif. 1998); (4) **Colorado:** U.S. West Communications v. City of Longmont, 948 P.2d 509, 523 (Colo. 1997); (5) **Connecticut:** Bauer v. Waste Management of Connecticut, 662 A.2d 1179, 1198 (Conn. 1995); (6) **Florida**: Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166, 170 (Fla. 4th DCA 1998); (7) **Idaho:** Sprenger, Grubb & Assoc., Inc. v. City of Hailey, 903 P.2d 741, 747 (Idaho 1995); (8) **Indiana:** Ragucci v. Metro. Dev. Comm'n of Marion County, 702 N.E.2d 677, 683-684 (Indiana 1998); (9) **Iowa**: Bormann v. Board of Supervisors for Kossuth County, 584 N.W.2d 309, 316 (Iowa 1998); (10)**Kentucky**: Commonwealth of Kentucky v. Stearns Coal and Lumber Co., 678 S.W.2d 378, 381 (Kentucky 1984); (11) **Maryland**: Offen v. County Council of Prince Georges County, 625 A.2d 424, 442 N.E.2d 1300, 1303 (Mass. 1996); (12) **Massachusetts:** Leonard v.

Circuit's ruling suggests that the jurisprudence interpreting the United States Constitution should not be used in analyzing a "taking" under the Louisiana Constitution, the Fourth Circuit's ruling conflicts

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(footnote 6 continued)

Town of Brimfield, 666 (13) **Minnesota**: Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996); (14) **Missouri**: Clay County, County Commission of Clay v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo.Ct.App. 1999); (15) **Nebraska**: Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 408 (Nebraska 1994); (16) **Nevada:** Kelly v. Tahoe Regional Planning Agency, 855 P.2d 1027, 1034 (Nevada 1993); (17) **New Hampshire**: Quirk v. Town of New Boston, 663 A.2d 1328, 1334 (N.H. 1995); (18) **New Jersey:** Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1386 - 1388 (N.J. 1992); (19) **North Carolina:** Sherrill v. Town of Wrightsville, 334 S.E.2d 357 (N.C.App. 1986); (20) **North Dakota:** Southwest Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 894 - 895 (N.D. 1995); (21) **Ohio**: State v. State Teachers Retirement Board, 697 N.E.2d 644, 650 -651 (Ohio 1998); (22) **Oregon:** Dodd v. Hood River County, 855 P.2d 608, 615 -616 (Oregon 1993); (23) **Pennsylvania**: Mock v. Dept. of Environmental Resources, 623 A.2d 940, 945-949 (Penn. 1993); (24) **Rhode Island:** Woodland Manor III Assoc. v. Keeney, 713 A.2d 806, 813 (R.I. 1998); (25) **Texas**: Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935-938 (Texas 1998); (26) **Vermont:** Chioffi v. City of Winooski, 676 A.2d 786, 790 (Vermont 1996); (27) **Virginia:** Board of Supervisors of Prince William County v. Omni Homes, Inc., 481 S.E.2d 460, 465- 466 (Virginia 1997); (28) **Washington**: Presbytery of Seattle v. King County, 787 P.2d 907, 915 (Washington 1990); (29) **Wisconsin**: Zealy v. City of Waukesha, 534 N.W.2d 917, 921 - 924 (Wis.Ct.App. 1995), rev'd on other grounds, 548 N.W.2d 528 (Wis. 1996); (30) **Wyoming:** Cheyenne Airport Board v. Rogers, 707 P.2d 717, 731 (Wyoming 1985).

directly with the **Louisiana Supreme Court**,[7] other **Louisiana appellate courts**,[8] as well as the **Fourth Circuit itself**.[9]

2.The Fourth Circuit's ruling presents **significant unresolved issues of law** insofar as the newly created defense of the Claimants' "bad faith" in the context of inverse condemnation law. The issues associated with a claimant's prior knowledge of governmental action as a governmental defense to a "takings" claim has **never been addressed by this Honorable Court**. Over the strong dissent of Judge Miriam Waltzer, arguably one of the more experienced Fourth Circuit judges insofar as takings are

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7 Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission, 97-1367 (La. 5/19/98), *8-9, 715 So.2d 387, 392.

8 LaSalle v. Iberia Parish Council, 99-216 *10 (La.App. 3rd Cir. 6/2/99), 741 So.2d 812, 818 - 819; Standard Materials, Inc. v. City of Slidell, 96-0684 (La.App. 1st Cir. 9/23/97), 700 So.2d 975; Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234; Annison v. Hoover, 517 So.2d 420, 423 (La.App. 1st Cir. 12/22/87); writ denied by 519 So.2d 148 (La. 2/12/88); Ursin v. New Orleans Aviation Board, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87); reversed for different reasons by 515 So.2d 1087 (La. 1987).

9 State Department of Social Services v. City of New Orleans, 95-1757, 1758 *7 (La.App. 4th Cir. 5/29/96), 676 So.2d 149, 154.

concerned,[10] the Fourth Circuit has also created new law unsupported by legal authority through the cross-application of the defense of "bad faith" from expropriation law and reinsertion of this concept in the context of "takings" or inverse condemnation litigation. The Fourth Circuit has also gone one step further in its creation of new law by ruling that the only defense to a "takings" claim brought against any Louisiana governmental entity is the Claimant's "bad faith." If this becomes the law, this essentially makes a Claimants' recovery automatic merely upon (1) an allegation of a "taking," and, (2) a prima facie showing that a claim is not fraudulent, which is the government's burden of proof for "bad faith" in an expropriation proceeding.[11] Such a rule of law has never been applied or perhaps even considered by

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10 See, e.g. Haspel & Davis Mill. & Planting Co. Ltd. v. Board of Levee Com'rs of Orleans Levee Dist., 95-0233 (La.App. 4th Cir. 9/4/96), 680 So.2d 159, 135 Oil & Gas Rep. 513 (La.App. 4th Cir., 9/4/96); Vogt v. Board of Levee Com'rs of Orleans Levee Dist., 95-1187 (La.App. 4th Cir. 9/4/96), 680 So.2d 149; Gravolet v. Board of Com'rs for Grand Prairie Levee Dist., 95-2477 (La.App. 4th Cir. 6/12/96, 676 So.2d 199; State Department of Social Services v. City of New Orleans, 95-1757, 1758 *7 (La.App. 4th Cir. 5/29/96), 676 So.2d 149, 154; Edgecombe v. Board of Levee Com'rs of Orleans Levee Dist., 94-1493 (La.App. 4th Cir. 2/23/95), 650 So.2d 1249, 131 Oil & Gas Rep. 298; Henry v. State, 94-0658 (La.App. 4th Cir. 11/30/94), 646 So.2d 519; Board of Com'rs of New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Co., 625 So.2d 1070 (La.App. 4th Cir. 9/22/93), writ denied, 627 So.2d 638 and 630 So.2d 802 (La. 1994) and cert. denied, 512 U.S. 1220, 114 S.Ct. 2707 (1994).

11 State Department of Highways v. Vermillion Development Co., 249 So.2d 161, 171 (La. 1971).

any Louisiana Court in inverse condemnation cases.

3.The Fourth Circuit's opinion also has the effect of **overruling or modifying controlling precedents** from the **Louisiana Supreme Court** related to the preclusive effect of a prior federal decision as issued by the **Louisiana Supreme Court**[12] and the Courts of Appeal[13] including the **Fourth Circuit itself.**[14]

4.The Fourth Circuit's opinion is based upon **an erroneous interpretation and application of the United States Constitution and law applicable thereto** including the Supremacy Clause, and federal common law, as well as the Louisiana Constitution, Article I Section 4, related to "takings" and **applicable Louisiana law**. The State is the party Defendant herein; thus, if the Fourth Circuit's decision is allowed to stand, the decision will **cause material injustice to the State and the people of the State which will, in turn, significantly affect the public interest** by creating a chilling effect upon all governmental action for fear of provoking "takings" claims. Under the Fourth Circuit's opinion a "takings" claim cannot be overcome unless the government can

12 Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993).

13 Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 191; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439.

14 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989; McCollough v. Dauzat, 736 So.2d at 915.

prove ***fraud*** on the part of the Claimant. This chilling effect will extend far beyond bankrupting the State's coastal restoration projects with claims such as those presented here for oyster lease damages. The Fourth Circuit's ruling will allow every special interest group or isolated individual to bring a claim for inverse condemnation or a "taking" whenever some type of allegedly adverse economic ripple occurs following any form of governmental action.

5.DNR also submits that **review is warranted under the applicable law.** DNR's reasoning is based upon the premise that when the lower courts' action is arguably incorrect, and a reversal will terminate the litigation, and when there is no disputed fact to be resolved, judicial efficiency and fundamental fairness to the litigants dictates that the merits of the application for supervisory writs should be decided in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits.[15] Further, this Honorable Court has recognized that due to their unique nature, issues related to class actions such as the instant matter, require supervisory review.[16]

6.Next, in light of Act. 483 of 1997 which amended La. C.C.P. Art. 966 related to **summary judgment proceedings**, it is respectfully suggested that this Honorable Court should review this matter since **a reversal of the Fourth Circuit will be dispositive of the entire case.** Those amendments are to be applied

15 Herlitz Construction Company, Inc. v. Hotel Investers of New Iberia, Inc., 396 So.2d 878 (La. 1981).

16 Cotton v. Gaylord Chemical, 680 So.2d 1187 (La. 1996).

retroactively as well as prospectively.[17] Review at this time is consistent with the legislative intent in that the summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this, and the procedure is favored and shall be construed to accomplish these ends.[18] This Honorable Court's review of this matter at this time accomplishes all of these legislative aims and goals.

7.Finally, DNR respectfully requests **expedited consideration** given the fact that immediately after the Fourth Circuit's adverse ruling, the Plaintiffs moved to set this matter for trial. A status conference was thereafter immediately set in this matter at which time it is contemplated based upon the history of prior proceedings in this matter that a trial date will be set within months. With the setting of the status conference, **DNR has timely sought a stay** which was denied by both the Trial Court[19] and the Fourth Circuit[20] despite the implications of this writ application and the fact that there are still six writ applications pending before the Fourth Circuit. DNR therefore **seeks expedited relief as well as a stay of all proceedings** in the Trial Court and in the Fourth Circuit.

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17 Perry Waller v. American Seafoods Company, 97-0302, p. 1 (La.App. 4th Cir. 10/1/97), 700 So.2d 1306, 1307, writ not considered, 97-2769 (La. 1/30/98), 709 So.2d 693.

18 La. C.C.P. Art. 966 A(2) (1997).

19 Exhibit "D," Trial Court's Denial of Stay, CA No. 38-266 "B" (4/11/00).

20 Exhibit "E," Denial of Stay, CA No. 00-0855 (La.App. 4th Cir. 4/12/00).

STATEMENT OF THE CASE

A. THE PARALLEL PROCEEDINGS IN STATE AND FEDERAL COURTS BELOW.

Albert J. Avenal, Jr. and other oyster leaseholders/fishermen filed the present class action in the 25th Judicial District Court for the Parish of Plaquemines on March 29, 1994 on behalf of all persons holding oyster leases on state water bottoms in Breton Sound.[21] These Plaintiffs alleged that a "taking" had occurred without "just compensation" in violation of the Fifth Amendment of the U.S. Constitution and Article I, Section 4, of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the Caernarvon freshwater diversion structure, located on the east bank of the Mississippi River in Plaquemines Parish.

Meanwhile, on April 26, 1994, Albert Avenal and these same representative Plaintiffs filed suit in the U.S. Court of Federal Claims[22] against the United States, i.e., the United States Army Corps of Engineers, which had designed, financed and built the Caernarvon freshwater diversion structure. In that suit, these same Plaintiffs alleged the same "taking" under the Fifth Amendment of the U.S. Constitution, the very issue raised in the state court proceeding, and also sought class certification.

A comparison of the allegations set forth in the federal Complaint and the Petition filed in the 25th Judicial

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21 Exhibit "F," State Petition, CA No. 38-266, 25th JDC, Parish of Plaquemines.

22 Exhibit "G," Albert J. Avenal, Jr. et al. v. The United States of America, United States Court of Federal Claims, No. 94-261-L.

District Court reveals that the cases deal with the identical issue: whether a taking occurred as a result of the operation of the Caernarvon freshwater diversion structure.

For example, paragraph 5 of the federal Complaint reads as follows:

> 5.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The United States Army Corps of Engineers attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the saltwater areas.[23]

The state court Petition reads similarly:

> V.
>
> The stated purposes of the Caernarvon Project include, but are not limited to, the enhancement of the emergent marsh vegetation growth and a reduction of marsh loss. The Department of Natural Resources attempts to achieve this stated goal by allowing fresh water from the Mississippi River to flow through the Caernarvon structure into the salt water areas wherein plaintiffs' leases

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23 Id.

are located, thereby reducing the salinity and salt content in the waters where plaintiffs' leases are located.[24]

The sixth paragraph of both pleadings also reads similarly:

6.

When the freshwater diverted from the Mississippi reaches the water bottoms leased by plaintiffs from the State of Louisiana, it dilutes the salinity of the waters and deposits silt on the water bottoms. As a direct result of the dilution of the salinity of the waters wherein plaintiffs' leases are located, as well as the increased vegetation and bacteria on or near the water bottoms where plaintiffs' leases are located, and the silt deposits, the productivity of plaintiffs' leases has been and is being destroyed, as the altered conditions of the waters wherein plaintiffs' leases are located makes Plaintiffs' leases no longer capable of oyster growth and cultivation.[25]

VI.

As a direct result of the dilution of the salinity and salt content of the waters wherein plaintiffs' leases are located, as well as the increased vegetation on or near the water

24 Exhibit "F," State Petition.

25 Exhibit "G," Federal Complaint.

> bottoms wherein plaintiffs' leases are located, the productivity of plaintiffs' leases have been damaged, as the reduced salinity of the waters wherein plaintiffs' leases are located makes plaintiffs' leases no longer capable of oyster growth and cultivation. The hereinabove described actions of defendant has resulted in a permanent and substantial interference with Plaintiffs' use and enjoyment of their land amounting to a taking of an interest in Plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and the Fifth Amendment of the United States Constitution.[26]

Finally, paragraph 7 of the federal Complaint and paragraph VIII of the state Petition also read similarly:

> 7.
>
> The hereinabove described actions of defendant have resulted in permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of the Fifth Amendment of the United States Constitution.[27]

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26 Exhibit "F," State Petition.

27 Exhibit "G," Federal Complaint.

VIII.

As a direct result of the hereinabove described action of defendants, the productivity of plaintiffs' leases have been destroyed, resulting in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in plaintiffs' valuable property rights without compensation in violation of Article I, Section 4 of the Louisiana Constitution of 1974, and of the Fifth Amendment of the United States Constitution.[28]

With the exception of the identity of the named governmental defendant, the Petition filed in the 25th Judicial Court is virtually indistinguishable from the Complaint filed in federal court. Although the names of the Defendants were changed, the issue remains identical - whether a "taking" has occurred as a result of the operation of the Caernarvon freshwater diversion structure.

In response to the federal Complaint, the United States moved for summary judgment on several grounds, all related to the "takings" issue. Among these, the United States asserted that the Plaintiffs had no compensable expectancy or property interest in continued saltwater intrusion or elevated salinity levels associated with the Mississippi River levee system. The United States also argued that the Plaintiffs had no reasonable investment-backed expectations in any oyster leases in historically fresh

28 Exhibit "F," State Petition.

areas of the Breton Sound Area which was the subject of the litigation. In support of its motion for summary judgment, the United States provided the court with a detailed and comprehensive analysis of the history of freshwater diversions for environmental enhancement and coastal restoration, including the Caernarvon Project. The evidence presented significant information and documentation in support of the United States' position that there were no reasonable investment-backed expectations in those leases since the Plaintiffs were put on notice as to the planning and construction of the project decades ahead of time.

The Plaintiffs filed a lengthy opposition memorandum, fully addressing the issues raised in the United States' motion for summary judgment. As the lower federal court would eventually note, Plaintiffs conceded many of the factual issues related to notice. Significantly, the court noted the undisputed effect that the freshwater diversion structure to be constructed at Caernarvon would have on the oyster fishermen:

> "The zone where conditions will become too fresh and not favorable for oyster cultivation as a result of the [Caernarvon] diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation." Def's Proposed Findings of Fact No. 8, filed Feb. 7, 1995 (citations omitted). ***Plaintiffs do not dispute this fact.*** (Emphasis added)[29]

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29 Avenal v. United States, 33 Fed.Cl. 778, 781 (Fed. Cl. 1995). See Exhibit "H".

The court further noted:

> The Caernarvon project was designed not only to abate saltwater intrusion, but also to abate marine tidal invasion. ***At the July 31, 1984 public hearing, the President of the Louisiana Oyster Dealers and Growers indicated his support for both the Caernarvon project and freshwater diversion structures generally.*** (Emphasis added)[30]

B. ULTIMATE DETERMINATION IN FEDERAL COURT.

On August 2, 1995, the Court of Federal Claims granted the United States' Motion for Summary Judgment, finding that the leaseholders hold no compensable property interest in the salinity of the waters above their leased acreage, an area which had been historically too fresh for oyster cultivation prior to the construction of the Mississippi River levee system.[31] The lower court's opinion also specifically addressed the United States' argument related to the lack of reasonable investment-backed expectations in the subject leases.

On November 12, 1996, the U.S. Court of Appeals for the Federal Circuit affirmed the lower court's judgment, but on different grounds.[32] The Court held that these same oyster lessees could not have had reasonable investment-backed expectations such that their oyster leases would give

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30 Id. See Exhibit "H".

31 Id. See Exhibit "H".

32 Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996). See Exhibit "I".

them rights protected from the planned freshwater diversions of the state and federal governments.[33] The Federal Circuit held that under entrenched constitutional law the absence of reasonable investment-backed expectations barred the Plaintiffs' recovery.[34] In reaching this conclusion, the Federal Circuit restated and confirmed the federal position regarding regulatory takings under the federal law as set out by the U.S. Supreme Court.[35]

The Court reiterated the lower court's findings with respect to Plaintiffs' prior notice of the Caernarvon project and its effects on the oyster industry, resulting in their lack of reasonable investment-backed expectations:

> It is hard for them [the Plaintiffs] to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.
>
> ... (T)hey cannot here insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely shared public concerns, ***including concerns of the oyster industry itself***, government actions were being planned that would directly affect their new economic investments. These concerns and

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33 Id. at 937. See Exhibit "I".

34 Id.

35 Id. citing, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978).

> plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. (Emphasis added).[36]

The Court concluded by stating:

> In light of the history of events in this case, plaintiffs, as a matter of law must be assumed to have known that their rights to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.[37]

C. STATE COURT PROCEEDINGS TO DATE

While the federal proceedings had terminated, the State court proceedings in the 25th JDC, Parish of Plaquemines continued. In accordance with the court's pretrial scheduling order, on December 15, 1998, DNR filed several motions for summary judgment, including one based on the issue of collateral estoppel.[38] DNR asserted that the decision in the federal proceeding dismissing Plaintiffs'

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36 Id. at 937.

37 Avenal, 100 F.3d at 937. See Exhibit "I".

38 Judge Roe took DNR's other motions for summary judgement under advisement. Thus, the issues raised on those motions are not made a part of this Writ Application.

claims on summary judgment had a preclusive effect upon the state court proceedings and thus, the present suit against the State should likewise be dismissed. This matter came for hearing before the Honorable William A. Roe on January 5, 1999. Judge Roe denied all of DNR's Motions including DNR's Motion for Summary Judgment Based Upon the Doctrine of Collateral Estoppel.[39] From the Trial Court's adverse decision, DNR filed an application for supervisory writs and/or writs of review before the Fourth Circuit Court of Appeals on January 15, 1999. The Fourth Circuit then issued a stay order regarding further proceedings pending its action on the writ application.

On March 3, 1999, a five judge panel for the Fourth Circuit issued a 3-2 opinion authored by Judge Miriam Waltzer granting the writ application, and reversed the Trial Court's denial of summary judgment.[40] The Fourth Circuit panel found that the issue of the preclusive effect of a prior federal decision was a matter of federal law, and on this basis determined that the Plaintiffs' claims were barred by the federal common law of collateral estoppel.[41] All five

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39 See Exhibit "A".

40 Exhibit "B," Original Opinion, CA No. 99-0127 (La.App. 4th Cir. 3/3/99), Majority opinion by Judge Waltzer in which Judge Pro Tempore James C. Gulotta and Judge Pro Tempore Philip C. Ciaccio joined; Judge James F. McKay, III issued a separate opinion in which he concurred in part and dissented in part. Chief Judge Robert J. Klees joined in Judge McKay's opinion. The five judge panel apparently resulted from the preliminary decision of the original three judge panel to overrule the Trial Court, all in accordance with Uniform Appellate Rule 1 - 5.

41 Id. at 6 - 11.

judges agreed that the Plaintiffs' inverse condemnation claims under the Fifth Amendment of the United States Constitution were barred by the doctrine of collateral estoppel.[42]

The Plaintiffs thereafter sought rehearing on March 17, 1999, requesting that the panel compare the facts in the two cases to see if the elements of collateral estoppel had been met, i.e., whether the fact situations matched. On March 26, 1999 the Fourth Circuit issued a writ of certiorari to the 25th JDC[43] so as to allow the Court "to consider whether the issue actually litigated in the prior federal action is identical to an issue at stake in this subsequent state action."[44]

Following oral argument on September 15, 1999, the same five judge panel of the Fourth Circuit reversed itself 3-2, not on the basis of a comparison of the two Courts' records, but rather on entirely legal bases. Essentially Judge Ciaccio changed his vote issuing written reasons in a concurring opinion accompanying the majority opinion. The Fourth Circuit panel's majority opinion created new law to overrule its prior opinion, holding that: (1) collateral estoppel is inapplicable under any circumstances in any Louisiana Court despite federal and state law to the contrary; (2) the legal standard applicable to "takings" under Louisiana constitutional law differs from that under federal constitutional law; (3) the United States Supreme Court's requisite consid-

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42 Id. See concurring/dissenting opinion of Judge James McKay, III.

43 Exhibit "J".

44 Exhibit "C," Opinion on Rehearing, CA No. 99-0127 (3/15/00), ___ So.2d ___ dissent of Judge Miriam Waltzer at p. 2.

eration of reasonable or distinct investment-backed expectations to determine whether a taking has occurred is simply "irrelevant" under Louisiana law; and, (4) the only bar to compensation under either an expropriation or inverse condemnation action in Louisiana is the "bad faith" of the claimant.

From this adverse ruling based entirely upon new law, DNR seeks review. Given the import of this decision on the State's entire coastal restoration program as well as the potential exposure of all governmental entities at every level in Louisiana for inverse condemnation claims as a result of this ruling, DNR seeks expedited review. DNR also seeks herein a stay order as regards all proceedings in this matter since there are presently six pending writ applications at the Fourth Circuit, and, the Trial Court has set this matter for an immediate status conference to set a trial date which could be within months. DNR has previously sought and obtained stays at the Fourth Circuit level on this matter but was denied such relief at this time.[45] DNR had also exhausted all stay remedies at the Trial Court level.[46]

ASSIGNMENT OF ERRORS

Defendants/Applicants submit that the Trial Court and/or the Fourth Circuit have erred as follows:

1.The lower courts erred by failing to dismiss the Plaintiffs' claims which were barred by the doctrine

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45 Exhibit "E".

46 Exhibit "D".

of collateral estoppel as applied under the federal common law applicable to the state court proceeding, and by failing to give full faith and credit to a prior federal decision.

2.The Fourth Circuit erred by creating an artificial distinction between what constitutes a "taking" under the United States and Louisiana Constitutions.

3.The Fourth Circuit committed a gross departure from the established and existing jurisprudence of the United States Supreme Court and many of the courts of the United States as well as the Louisiana courts by eliminating consideration of reasonable and/or distinct investment-backed expectations from a court's analysis of "takings" or inverse condemnation claims.

4.The Fourth Circuit erred in eliminating all governmental defenses to claims for "takings" or inverse condemnation claims except for the defense of "bad faith."

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47 Exhibit "B," Albert J. Avenal, Jr., et al. v. The State of Louisiana, The Department of Natural Resources, CA No. 99-C-0127, original opinion dated 3/3/99 granting DNR's writ and reversing Trial Court judgment, p. 6.

48 Exhibit "C," Opinion on rehearing, CA No. 99-C-0127, dissent, *2 (La.App. 4th Cir. 3/15/00).

SUMMARY OF ARGUMENT

The Fourth Circuit's ruling presents a frontal assault on three major entrenched areas of constitutional law: (1) the supremacy of federal law; (2) the constitutional analysis of a "taking" or inverse condemnation claim; and, (3) the legal concepts of expropriation and inverse condemnation under Louisiana law.

If allowed to stand, this decision will completely transform the law related to inverse condemnation or "takings" in Louisiana by eliminating all governmental defenses available to State, Parish and local government for "takings" claims except for a new defense of "bad faith," or fraud, heretofore never applied in the context of inverse condemnation. Absent proof of fraud, all "takings" claims are valid, and any governmental action is now subject to challenge and compensation. Such challenges will include regulatory rulings, zoning changes, physical proximity or occupation claims, delays or detours, wetland regulation, permit issuance, and in fact, any governmental decision which might have any economic impact whatsoever, no matter how slight, as long as the claims are based on a "takings" or inverse condemnation theory.

The Fourth Circuit not only eliminated governmental defenses, but also jettisoned the United States Supreme Court's second fundamental requirement for a takings claim to proceed: that the claimant have reasonable "investment-backed expectations" in the property that is allegedly taken. To reach this result the Fourth Circuit merged statutory concepts of expropriation with inverse condemnation, a concept defined by a fast growing body of jurisprudential law, primarily federal in origin.

Lastly, the Fourth Circuit refused to apply the federal interpretation of the doctrine of collateral estoppel to the Plaintiffs' claims in these proceedings which are identical to those brought by these same Plaintiffs in a parallel federal proceeding. Had the Fourth Circuit done so, the Plaintiffs' claims would have been dismissed.

ARGUMENT

I.THE TRIAL COURT AND LATER THE COURT OF APPEALS SHOULD HAVE DISMISSED THE PLAINTIFFS' CLAIMS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL PURSUANT TO APPLICABLE FEDERAL COMMON LAW.

A. The Preclusive Effect of a Prior Federal Decision Is an Issue of Federal Law.

Judge Miriam G. Waltzer of the Fourth Circuit succinctly explained in her original majority opinion why the Fourth Circuit was bound to apply federal common law related to collateral estoppel in this matter, citing precedent from this Honorable Court:

> We must apply federal law to determine the effect of the judgment, rendered in the federal action, on the proceedings in state court. Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993). We must apply federal law to "determine the **preclusive effects**

> of a judgment rendered by a federal court exercising federal question jurisdiction." Id.[47]

After the 3-2 opinion issued reversing the original Fourth Circuit Judgment and Judge Waltzer's scholarly opinion, Judge Waltzer set out the applicable law which formed the basis for her original reasoning in the dissent she prepared in which Judge James C. Gulotta joined:

> In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. Reeder v. Succession of Palmer, 623 So.2d 1268, 1271 (La. 1993). Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. Recoveredge, L.P. v. Pentecost, 44 F.3d 1284, 1291 (5th Cir. 1995). Although the leaseholders did not sue the State of Louisiana in the prior federal suit, such an identity of parties is not required to apply the doctrine of collateral estoppel, or issue preclusion. Blonder - Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 798 (1970).[48]

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47 Exhibit "B," Albert J. Avenal, Jr., et al. v. The State of Louisiana, The Department of Natural Resources, CA No. 99-C-0127, original opinion dated 3/3/99 granting DNR's writ and reversing Trial Court judgment, p. 6.

48 Exhibit "C," Opinion on rehearing, CA No. 99-C-0127, dissent, *2 (La.App. 4th Cir. 3/15/00).

Judge Waltzer's original opinion written for the majority as well as her dissent to the eventual 3-2 opinion on rehearing both frames and capsulizes DNR's position on this issue. In line with this Honorable Court's opinion in Reeder, Louisiana courts have repeatedly and consistently held that the preclusive effect of a prior federal decision is an issue of federal common law, not Louisiana State law.[49] The majority opinion on rehearing mistakenly relied upon cases dealing with the preclusive effect of prior *state*, not federal, decisions.[50]

The preclusive effect of a prior federal decision emanates from the United States Constitution's Supremacy Clause[51] and Full Faith and Credit Clause[52] as well as the federal "full faith and credit" statute[53] all of which require each State to give the same effect to the judgments of federal courts as those judgments have in the jurisdictions where

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49 Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654 *14 (La. 1/16/96), 666 So.2d 624, 632-3; Trich v. Crescent Turn Key & Engineering, L.L.C., 99-310 *5 (La.App. 5th Cir. 9/28/99), 744 So.2d 689, 692; Andrepont v. Andrepont, 97-1643 *3 (La.App. 3rd Cir. 4/1/98), 711 So.2d 759, 761; Williams v. Insurance Company of North America, 96-0847 *3 (La.App. 4th Cir. 3/19/97), 692 So.2d 654, 656; Rochon v. Whitley, 96-0835 *4 (La.App. 1st Cir. 2/14/97), 691 So.2d 189, 191; Schlesinger v. Herzog, 95-1127 *21 (La.App. 4th Cir. 4/3/96), 672 So.2d 701, 714; Tye v. Co-Mar Offshore Operators, Inc., 95-0094 *3 (La.App. 1st Cir. 10/6/95), 669 So.2d 438, 439; City of New Orleans v. Badine Land Ltd., 94-2631 *6 (La.App. 4th Cir. 6/29/95), 657 So.2d 770, 773; Tolis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 94-1444 *8 (La.App. 4th Cir. 5/16/95), 655 So.2d 747, 753.

50 Steptoe v. Lallie Kemp Hospital, 634 So.2d 331, 335 (La. 1994); Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978).

51 Art. VI, Section 2.

52 Art. IV, Section 1.

53 28 U.S.C. §1738.

rendered.[54] Indeed, in Pilie & Pilie v. Metz,[55] this Honorable Court noted that "the principle that a state court must apply federal law in deciding upon at least the central core of res judicata effects of *any* federal court judgment is immanent within the constitution and laws establishing our federal system".[56] The collateral estoppel component of res judicata is included within the full faith and credit mandate of this principle.[57]

Consistent with this rule of law, the Louisiana courts have likewise recognized the preclusive effect of a prior federal court determination or decision and have applied the federal common law rule of collateral estoppel.[58] In fact, an earlier opinion by Judge James McKay, III, the author of the majority opinion in this matter, applied a collateral estoppel analysis under federal common law based upon his conclusion that, "federal law governs the preclusive effects of a federal judgment."[59] Moreover, the entire panel in this matter recognized the applicability of collateral estoppel by dis-

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54 Heck v. Humphrey, 512 U.S. 475, 488 n. 9, 114 S.Ct. 2364, 2373 n. 9 (1994); Magnolia Petroleum Company v. Hunt, 320 U.S. 430, 437- 438, 64 S.Ct. 208, 212- 213 (1943); Stoll v. Gottlieb, 305 U.S. 165, 167 - 171, 59 S.Ct. 134, 135 - 138 (1938); Crescent City Livestock Landry & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U.S. 141, 160, 7 S.Ct. 482, 474 (1887); Embry v. Palmer, 107 U.S. 3, 9 - 10, 2 S.Ct. 25, 27 - 30 (1872).

55 547 So.2d 1305, 1308 (La. 1989).

56 Id. at 1308, citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, section 4468 (1981).

57 United States v. Silliman, 167 F.2d 607, 612, 620 - 621 (3rd Cir.), cert. denied, 335 U.S. 825, 69 S.Ct. 48 (1948).

58 See, e.g., McCollough v. Dauzat, 98-1293 *3 (La.App. 3rd Cir. 3/3/99), 736 So.2d 914, 915.

59 Stone v. Entergy Services, Inc., 99-0236 *3 (La.App. 4th Cir. 8/18/99), 744 So.2d 141; writ denied, 99-2719 (La. 11/24/99), 750 So.2d 989.

missing the Plaintiffs' claims based upon the Fifth Amendment "taking" theories. Thus, the majority has already acknowledged that the facts necessary to prove a taking are missing from this matter, and should have dismissed federal and state claims.

"Application of collateral estoppel in this matter is also consistent with the general principles or policy reasons behind the concept of res judicata of which collateral estoppel forms a part, i.e., to promote judicial efficiency and final resolution of disputes by preventing needless relitigation. Indeed, not too long ago the Louisiana legislature spoke on the viability of this policy, by relaxing the rules of res judicata.[60] In this same vein, as former Chief Justice John A. Dixon, Jr. had written well before those amendments:

> It is implicit in the concept of a judicial system that controversies be finally resolved so that parties may enjoy their rights and so that conflicting legal obligations may not be imposed on an individual; litigation must end at some point. Precluding relitigation prevents inefficient use of the courts' resources, reduces the possibility of harassment through vexatious suits, and helps maintain respect for the judicial process by guarding against inconsistent decisions.[61]

If this Honorable Court should choose to apply applicable federal common law, i.e., the doctrine of collater-

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60 Acts 1990, No. 521 §1, eff. Jan. 1, 1991 amending La. R.S. 13:4231 (see also comments related to same).

61 Dixon, Booksh, Zimmering, Res Judicata in Louisiana Since Hope v. Madison, 51 Tul.L.Rev. 611 (1977), (footnotes in quotation omitted.)

al estoppel, in accordance with the applicable federal constitutional and statutory law and consistent with prior opinions of the Louisiana courts, DNR submits that the Plaintiffs' claims must be dismissed under the applicable federal common law associated with the federal courts' interpretation of the doctrine of collateral estoppel, here defensive collateral estoppel.

B. Application of the Federal Common Law of Collateral Estoppel Results in the Dismissal of Plaintiffs' Claims.

The *federal* law of collateral estoppel, which the trial court is required to apply, consists of four elements:

(1)The issue at stake must be identical to the one involved in the prior action;

(2)The issue must have been actually litigated in the prior action;

(3)The determination of the issue in the prior action must have been a necessary part of the judgment in that earlier action; and

(4)There is no special circumstance that would make it unfair to apply the doctrine.[62]

All of the factors necessary for the court to apply the federal law of collateral estoppel have been met. First, as can be seen from the federal Complaint and the state court Petition, the takings issue is identical. Second, the takings

62 Copeland, supra, at 1423.

issue was actually litigated in both the federal trial court and federal appellate court, with the appellate court specifically affirming summary judgment based on the fact that the Plaintiffs had no reasonable investment-backed expectations in their leases.[63] More importantly, the Fourth Circuit's opinion on rehearing does not indicate that there is any factual distinction between the two cases. As to the third element of the collateral estoppel test, the takings issue was a necessary part of the federal judgment. In fact, the decision on the takings issue was the core of the dispute. Fourth and finally, there is no special circumstance that would make it unfair to apply the doctrine of collateral estoppel.

The United States Supreme Court has specifically held that collateral estoppel may be asserted by a party even if that party was not involved in the prior litigation.[64] This is known as defensive collateral estoppel wherein a plaintiff is estopped from asserting a claim that the plaintiff has previously litigated and lost against another defendant.[65] As the United States Fifth Circuit has held, "collateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack."[66] In other words, the defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switch-

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63 See Exhibit "I".

64 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-333, 99 S.Ct. 649-52 (1979).

65 Id.

66 Exhibitors Poster Exch., Inc. v. National Screen S.C., 517 F.2d 110, 114 (5th Cir. 1975).

ing adversaries."[67] Stated succinctly, defensive collateral estoppel may be urged by a party to the second suit who was not even a party to the first suit.[68]

As the Federal Circuit affirmed the Court of Federal Claims' dismissal of the Plaintiffs' complaint on summary judgment and all of the elements of collateral estoppel have been met, the Trial Court should have applied the doctrine of defensive collateral estoppel, thereby dismissing the Plaintiffs' claims in the instant litigation in their entirety.

II. THE FOURTH CIRCUIT'S MAJORITY OPINION ATTEMPTS TO ELIMINATE "INVESTMENT-BACKED EXPECTATIONS" FROM CONSID ERATION IN THE ANALYSIS OF INVERSE CONDEMNATION CLAIMS CONTRARY TO ESTABLISHED CONSTITUTIONAL PRECEDENT.

A. "Investment-Backed Expectations" Form the Second Element of the Three Pronged Test for Takings under Established Constitutional Law.

The Federal Circuit dismissed the Plaintiffs' claims based upon the fact that the Plaintiffs had no reasonable investment-backed expectations in their oyster leases as required under the United States Supreme Court decision, Penn Central Transportation Company v. New York City.[69]

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67 Parklane Hosiery, supra, at 329, 651, citing Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 813, 122 P.2d, 892 at 895.

68 Id.

69 438 U.S. 104, 98 S.Ct. 2646 (1978).

The Penn Central inquiry entails a balancing test in which (1) the economic impact, (2) reasonable investment-backed expectations, and (3) the character of the governmental action at issue are weighed to determine whether compensation is mandated.[70] As part of its burden of proof, the claimant must show that the effects of the governmental action upon the property at issue frustrated reasonable expectations.[71] As recently as last year, the Federal Circuit reaffirmed the requisite takings analysis that "for any regulatory takings claim to succeed, the Claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him."[72] Moreover, a reasonable investment-backed expectation must be more than a "unilateral expectation or an abstract need."[73] Given the importance the Courts have placed on this concept, "investment-backed expectations," the requisite second element of the constitutional "takings" test has proved so important that

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70 Penn Central, 438 U.S. at 124 - 128, 98 S.Ct. 2646, 2659 (1978).

71 Florida Rock Industries, Inc. v. United States, 45 Fed.Cl. 21, 38 (1999).

72 Good v. United States, 189 F.3d 1355, 1360 (Fed.Cir. 1999), cert. denied, 529 U.S. ____, ____ S.Ct. ____ (4/3/00), citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994).

73 Ruckelshaus v. Monsanto, 467 U.S. 986, 1004 - 1006, 104 S.Ct. 2862, 2874 (1984); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 451 (1980).

it has been the subject of repeated and extensive comment.[74]

The Fourth Circuit's ruling suggests that Louisiana does not follow United States Constitutional law in any shape or form. This is not the case. In reality, like the established federal taking test, Louisiana has a formula for recovery under an inverse condemnation theory. In determining whether a claimant is entitled to eminent domain compensation in an action for inverse condemnation, our Louisiana Supreme Court has adopted a three-prong analysis:

> (1)Whether a person's legal right with respect to a thing or an object has been affected;

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74 See, e.g., No Taking Because Plaintiff Did Not Have Reasonable Investment-Backed Expectations: Lloyd A. Good, Jr. v. United States, No. 97-5138 (Fed. Cir. Aug. 31, 1999), 14 No. 9 NAAG Nat'l Envtl. Enforcement J. 27, October 1999; Washburn, "Reasonable Investment-Backed Expectations" As A Factor In Defining Property Interest, 49 Wash. U.J. Urb. & Contemp. L. 63, Summer 1996; Friedmann, Taking Claim Fails When Landowner Had No Investment-Backed Expectations, 10 NO. 4 N.Y. Real Est. L. Rep. 3, February 1996; Mandelker, Investment-Backed Expectations In Taking Law, 27 Urb. Law. 215, Spring 1995; Oswald, Cornering The Quark: Investment-Backed Expectations and Economically Viable Uses In Takings Analysis, 70 Wash. L. Rev. 91, January, 1995; Note: The Effect Of Notice Of Land Use Regulations Upon Investment- Backed Expectations And Takings Challenges, 23 Stetson L. Rev. 201, Fall, 1993; Spencer, Dashed "Investment-Backed" Expectations: Will The Constitution Protect Property Owners From Excesses In Implementation Of The Growth Management Act?, 16 U. Puget Sound L. Rev. 1223, Spring, 1993; Goldman-Carter, Protecting Wetlands And Reasonable Investment-Backed Expectations In The Wake Of Lucas v. South Caroline Coastal Council, 28 Land & Water L. Rev. 425, 1993; Ackerman, Searching For A Standard For Regulatory Takings Based On Investment-Backed Expectations, 36 Emory L.J. 1219, Fall, 1987.

(2)If it is determined that property is involved, whether the property, either a right or thing *has been taken or damaged in a constitutional sense*; and

(3)Whether the taking or damaging is for a public purpose under Article I, Section 4 of the Louisiana Constitution.[75]

Thus, to recover on an inverse condemnation in Louisiana, a claimant must establish that property "has been taken or damaged in a constitutional sense," the same burden of proof as is set out under the three-pronged federal constitutional test for recovery on an inverse condemnation theory. Not surprisingly, Louisiana courts look to the immense body of federal "takings" jurisprudence to determine whether a "taking" has occurred.

B. The Louisiana Supreme Court and the Lower Courts Have Consistently Applied United States Constitutional Law to Determine Whether a "Taking" Has Occurred in the Context of Inverse Condemnation Jurisprudence.

As Judge Waltzer observed in her original majority opinion in this matter, "Louisiana courts have consistently considered federal law in analyzing whether particular facts constitute a taking of property in similar **inverse condemnation** suits."[76] For example, in, Annison v. Hoover,[77] the Court took the opportunity to study the issue of inverse con-

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75 Id. at 603.

76 Exhibit "B," Original Opinion at p. 8 (emphasis original).

77 517 So.2d 420 (La. App. 1st Cir. 1987).

demnation with respect to a zoning ordinance enacted by the City of Denham Springs. The Court analyzed the inverse condemnation issue not under expropriation law, but rather under the United States Supreme Court precedents of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California[78] and Keystone Bituminous Coal Association v. DeBenedictis .[79] Importantly, the Annison Court also cites the United States Supreme Court case of Agins v. Tiburon,[80] which applies the Penn Central balancing test, ***the same test the Federal Circuit applied in affirming the lower court's grant of summary judgment in Avenal,*** to an inverse condemnation case.[81]

Other Louisiana courts have similarly decided takings/inverse condemnation cases, relying upon the most recent United States Supreme Court decisions addressing that issue. For example, in Layne v. City of Mandeville[82], the plaintiffs filed a takings claim alleging that a zoning regulation denied them the business use of their property. Plaintiffs in that matter initially contended that the Erie doctrine, which dictates that the substantive laws of States must govern, even where federal constitutional precepts are at issue controlled. Plaintiffs further argued that Louisiana case law and property concepts should override federal takings jurisprudence. The Court rejected such assertions, stating:

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78 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

79 480 U.S. 263, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

80 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

81 Annison, 517 So.2d at 423. Both First Evangelical and DeBenedictis also cite the Penn Central decision.

82 633 So.2d 608 (La. App. 1st Cir. 1993).

> The Erie doctrine is a federal rule which requires federal courts sitting in diversity to apply the substantive law of the States in which they are sitting. Erie has no application in state court. Moreover, because of the supremacy clause, ***all state law is subordinate to and may not detract from federal constitutional rights. U.S. Const. art. VI, cl. 2. Thus, we cannot agree with plaintiffs' suggestion that we are not bound by federal constitutional law in this case.*** (Emphasis added)[83]

The Layne Court then analyzed the plaintiffs" takings claim under the recently decided United States Supreme Court decision in Lucas v. South Carolina Coastal Council[84]. The trial court in Layne had granted defendant's motion for summary judgment by interpreting Lucas as stating a rule that a taking occurs only when an owner is deprived of all economically beneficial use of his land. The First Circuit disagreed, pointing out that Lucas also states that an owner not deprived of all use must undergo a fact specific determination of the economic impact of the regulation on the claimant and ***the extent to which the regulation has interfered with distinct investment-backed expectations.***[85] In other words, the First Circuit held that the trial

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83 Id. at 610.

84 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

85 Layne, 633 So.2d at 611, citing Lucas v. South Carolina Coastal Council, 112 S.Ct. at 2895.

court should have applied the Penn Central balancing test, the same test the Federal Circuit applied in affirming the lower court's ***grant of summary judgment in Avenal.***

The First Circuit again surveyed federal constitutional law in deciding an inverse condemnation case in Standard Materials v. City of Slidell.[86] The Court began its analysis by illustrating the similarities between the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment[87], and the Louisiana equivalent, Article I, Section 4 of the Louisiana Constitution. The Court then affirmed the dual structure of federal takings law, noting that a constitutional "taking" can be a physical taking or a regulatory taking.[88] The Court also cited with approval the holding in Layne, supra, that the determination of whether a taking has occurred is a factual determination,[89] ***i.e. the same test the Federal Circuit applied in affirming the lower court's grant of summary judgment in Avenal.***

More recently, this Honorable Court applied federal inverse condemnation/"takings" law in Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission[90] in determining whether a compensable tak-

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86 700 So.2d 975 (La. App. 1st Cir. 1997).

87 Id. at 984, citing Dolan v. City of Tigard, 512 U.S. 374, 383-384, 114 S.Ct. 2309, 2316 129 L.Ed.2d 304 (1994).

88 Id. at 990, n. 11, citing Yee v. City of Escondido, California, 503 U.S. 519, 522, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992) and Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985).

89 Id. at 984.

90 715 So.2d 387 (La. 1998).

ing of property interests of commercial fishermen had occurred as a result of the recently enacted gill net ban law. This Court initially noted the parallels of the "takings" clause under the Fifth Amendment of the United States Constitution and its counterpart under Article I, Section 4 of Louisiana Constitution.[91] This Court then focused on the interplay between federal takings law and state takings law under the Louisiana Constitution. Citing the United States Supreme Court case of Pennsylvania Coal v. Mahon,[92] this Court recognized the similarities and parallels between federal "takings" law and Louisiana takings law, echoing the Mahon decision as follows:

> Indeed, the takings clause of the State Constitution expressly provides that the state has the right in the exercise of its police powers to impose reasonable regulations on private property.[93]

Finally, this Court applied federal constitutional law concepts in rejecting the Plaintiffs' argument that the gill net ban law diminished the economic value of their equipment. Quoting Andrus v. Allard,[94] this Court stated that:

> (L)oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a taking

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91 Id. at 391-392.

92 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L.Ed. 322 (1922).

93 Id., citing, Louisiana Constitution Article I, Section 4.

94 444 U.S. 51, 65, 100 S.Ct. 318, 326-27, 62 L.Ed. 2d. 210 (1979).

> claim... The interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.[95]

Consistent with the approach this Honorable Court and the First Circuit have followed, but prior to this matter, the Fourth Circuit also followed or relied upon federal constitutional precedents and authority.[96] Accordingly, there was no jurisprudential authority for the Fourth Circuit to depart from existing federal and state constitutional jurisprudence in this matter and attempt to create an entirely new body of Louisiana constitutional law.

C. "Distinct Investment-Backed Expectations" Are Not Only Relevant, But Also Constitute a Critical and Requisite Consideration for Any Analysis of a "Takings" Claim.

In the majority opinion on rehearing, Judge McKay wrote that the, "'distinct investment-backed expectations' of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is *irrelevant* to the question of whether a "taking" has occurred under Louisiana law."[97] No authority, jurisprudential or otherwise, is cited for this pronouncement. Certainly no Louisiana Court prior to the Fourth Circuit's majority opinion has ever reached such a conclusion. In fact, as shown

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95 Id. at 392-393, citing Andrus, 444 U.S. at 66, 100 S.Ct. at 327.

96 State Department of Social Services v. City of New Orleans, supra, at *7, 154.

97 Exhibit "C," Majority Opinion at p. 9 (emphasis added).

above, at least one other Louisiana appellate court has considered reasonable or distinct "investment-backed expectations" to be relevant.[98]

A review of the jurisprudence from the other forty-nine States reveals that the highest courts of twenty-four (24) States explicitly consider or recognize the requirement of "reasonable investment-backed expectations" in a "takings" analysis.[99] The intermediate appellate Courts of Appeal in six other States, Arizona, Florida, Missouri, North Carolina, North Dakota and Wisconsin have also used the factor.[100] Significantly, DNR has been unable to locate any state court which has rejected consideration of "reasonable" or "distinct" "investment-backed expectations" in a "takings" analysis.

When the absence of such a finding is coupled with the authorities cited, supra, it becomes readily apparent that the Fourth Circuit's attempt to eliminate consideration of "investment-backed expectations" from a "takings" analysis represents not only a total departure from the established constitutional law of the United States Supreme Court, but

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98 Layne v. City of Mandeville, 93-0046 (La.App. 1st Cir. 12/29/93), 633 So.2d 608, 610, writ denied, 94-0268 (La. 3/25/94), 635 So.2d 234.

99 See footnote 4, supra.

100 **Arizona:** Laidlaw Waste Systems, Inc. v. City of Phoenix, 815 P.2d 932, 935 (Ariz.Ct.App. 1991); **Florida**: Golf Club of Plantation, Inc. v. City of Plantation, 717 So.2d 166, 170 (Fla. 4th DCA 1998); **Missouri**: Clay County, County Commission of Clay v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo.Ct.App. 1999); **North Carolina:** Sherrill v. Town of Wrightsville, 334 S.E.2d 357 (N.C.App. 1986); **North Dakota:** Southwest Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W.2d 884, 894 - 895 (N.D. 1995); **Wisconsin**: Zealy v. City of Waukesha, 534 N.W.2d 917, 921 - 924 (Wis.Ct.App. 1995), rev'd on other grounds, 548 N.W.2d 528 (Wis. 1996).

also a departure from the jurisprudence of well over a majority (thirty) of the United States, as well as at least one lower appellate court of Louisiana. Accordingly, the Fourth Circuit's pronouncement comes without any authority whatsoever and should be overruled.

III. THE FOURTH CIRCUIT ERRED IN ELIMINATING ALL GOVERNMENTAL DEFENSES TO A TAKING SAVE FOR "BAD FAITH."

A. The Fourth Circuit's Opinion Renders All Louisiana Government Defenseless to "Takings" Claims.

Not unlike the recent tornado that swept through Houma, the Fourth Circuit's ruling has swept through the citadel of entrenched constitutional law, obliterating every known governmental defense and replacing them with a single heretofore unheard of defense in inverse condemnation, i.e., "bad faith." The Court has merged the distinct concepts of expropriation and inverse condemnation to conclude that, "the only bar (complete or partial) to compensation in either of these situations is bad faith."[101]

The Fourth Circuit's ruling cuts a wide swath through governmental defenses, eliminating such exceptions to governmental "takings" as the "government action requirement;" per se and total "takings" analyses; the "parcel as a whole" defense; considerations of temporary moratoria and prohibitions; forfeiture and fines; abatement of

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101 Exhibit "C," Majority Opinion at p. 9.

nuisances; emergency actions; the "bundle of rights" exception, and, categorical immunity.[102] In addition, the Fourth Circuit's ruling eliminates the navigable servitude defense,[103] the relative benefits doctrine[104] and the scope of wetland regulatory authority,[105] all of which were or should be available to any state governmental entity. All of these defenses vanish under the Fourth Circuit's ruling. Likewise, without any authority whatsoever, the Fourth Circuit has not only wiped out these defenses but also any consideration of "reasonable investment-backed expectations," a claimant's hurdle that has been critical to federal and state "takings" law analysis for decades.[106] The Fourth

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102 See, e.g., Sugameli, Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability For Fifth Amendment Takings of Private Property Far Outweigh the "Rule", 29 Envtl.L. 939, 944 - 958 (1999).

103 Avenal v. United States: Does the State of Louisiana Have a Property Interest in the Salinity of Its Waters?, 2 Ocean & Coastal L.J. 153, 160 - 163 (1996); Murphy v. Department of Natural Resources, 837 F.Supp. 1217, 1221 (S.D. Fla. 1993); Donnell v. United States, 834 F.Supp. 19, 26 (D. Me. 1993).

104 Hendler v. United States, 175 F.3d 1374, 1379 (Fed. Cir. 1999).

105 See, e.g., Dalazzola v. Coastal Resources Management Council, 1995 WL 941370 (R.I. S.Ct. 1/5/95) (appeal pending).

106 See, e.g., Forrest Properties, Inc. v. United States, 177 F.3d 1360, 1367 (Fed.Cir.), cert. denied, ___ U.S. ____, 120 S.Ct. 373 (1999) (rejecting an investment-backed expectations claim because the property was purchased in 1988, years after the Corps' wetland guidelines went into effect); Creppel v. United States, 41 F.3d 627, 632 (Fed.Cir. 1994) ("One who buys with knowledge of restraint assumes the risk of economic loss"); Brunelle v. Town of South Kingstown, 700 A.2d 1075, 1083 (R.I. 1997) ("(W)e do not believe that compensation is required for the simple reason that Brunelle, when he purchased the lot, did so with full knowledge [of the restrictions]"); Williams v. City of Central, 907 P.2d 701, 707 (Colo.Ct.App. 1995) ("If the landowner has

Circuit's action effectively reduces "takings" law in Louisiana to a system of automatic payments regardless of the merits of a "takings" claim, unless the governmental entity can prove "bad faith," i.e., fraud, a defense inexplicably somehow extracted from expropriation law.[107]

B. The Fourth Circuit's Action Renders Recovery on a "Takings" Theory Well-Nigh Automatic.

As this Honorable Court has recently observed, quoting several authorities:

> Governmental regulation - - by definition - - involves the adjustment of private rights for public benefit. To require compensation whenever the law curtailed the potential for economic exploitation 'would effectively compel the government to regulate by purchase.'[108] As a result, economic restraints do not rise to the level of a taking because, in

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(footnote 106 continued)
notice [at the time of purchase] of the extent of the government's regulatory authority over the property, the landowner's reasonable investment-backed expectations is the dispositive factor in the takings analysis."); Buechel v. Department of Ecology, 884 P.2d 910, 918 - 919 (Wash.Ct.App. 1994) (finding that the landowner could not claim that State Shoreline Management Act diminished the value of his property as he had acquired it after the Act was enacted).

107 State Department of Highways v. Vermillion Development Co., 249 So.2d 161, 171 (La. 1971).

108 Lawrence H. Tribe, American Constitutional Law, 596-97 (2dEd. 1988) (quoting Andrus v. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979) (emphasis in original)).

> the off-quoted words of former Justice Holmes, '(g)overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[109]

The Fourth Circuit's action flies in the face of this sound reasoning. Specifically, the Fourth Circuit's ruling eliminates all known governmental defenses and replaces them with a single defense of "bad faith," i.e., fraud, which has never been considered a defense in inverse condemnation by any state or federal court in Louisiana. DNR is unaware of any other court which has limited government entities to such a defense or even considered such a defense. If the Fourth Circuit's ruling is allow to stand, Louisiana government at every level, State, Parish or local, will be subjected to takings claims for which there will be no defenses other than fraud, bringing government at every level to a halt. This means that governmental officials will have to prove fraud against their own constituents and electorate or, alternatively, pay any claim presented to them.

C. To Reach Its Result, The Fourth Circuit Inexplicably Merged the Distinct Concepts of Expropriation and Inverse Condemnation.

The term "inverse condemnation" is neither synonymous nor interchangeable with "expropriation." Yet the

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109 Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Commission, 97-1367 (La. 5/19/98), *8-9, 715 So.2d 387, 392, citing, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922).

Fourth Circuit has incorrectly treated the two as one concept to conclude that the only defense to a "taking" is that available under expropriation, i.e., bad faith. As will be shown below, the two concepts are separate and distinct legal constructs under Louisiana law.

1. Expropriation

The power of ***expropriation*** or eminent domain is the right of the state or its subdivisions to take private property for public purposes, which is inherent in the police power of the state.[111] The Louisiana ***expropriation*** laws are a creature of statutory law and provide in detail how the expropriation proceedings must take place.[112] For example, La. R.S. 19:2.2 provides that before exercising its rights of expropriation, the state or its political subdivisions must provide the owner with certain information from its appraisal as to the amount of compensation due. The required information includes the name, address, and qualifications of the appraisers, the amount of the appraisals, and a description of the methodology used in the appraisal. Additionally, the state must offer to compensate the owner in an amount equal to at least the lowest appraisal.[113] Obviously, the major difference between expropriation and inverse condemnation is that the government intends to take property and institutes expropriation proceedings toward that end. In contrast, with inverse condemnation, it is unclear whether property has been taken. Therefore, the Claimant must prove the property has been taken or damaged and the government should be allowed to disprove

111 Hobgood v. Parish of East Baton Rouge, 563 So.2d 413 (La. App. 1st Cir. 1990), writ denied, 567 So.2d 105.

112 La. R.S. 19:1, et seq.

113 See, Board Of Commissioners, 625 So.2d at 1073 - 1074.

such a claim. An analogy can be made to the difference between stipulated liability in tort and an injured Plaintiff's burden of proof when liability in tort is contested.

The "bad faith" defense can arise when an ***expropriation*** proceeding has been undertaken by the State. Plaintiffs have repeatedly acknowledged that this is not an ***expropriation*** case, but an inverse condemnation case. In ***expropriation***, the State acknowledges that the property is being taken for a public purpose and only "bad faith" will justify a denial of, or reduction in, recovery. In contrast, an inverse condemnation action requires the Plaintiff to show that his property interest has been taken in a constitutional sense and all aspects of his property interest or economic expectations are placed directly at issue. Thus the Plaintiffs' prior knowledge or notice of the proposed government action is relevant to whether a "taking" actually occurred. Accordingly, the ***expropriation*** cases relied upon by the Plaintiffs in proceedings below completely contradict their self-described inverse condemnation suit against DNR. A careful review of inverse condemnation cases under Louisiana law reveals this important distinction.

2. Inverse Condemnation

The legal standard used in determining an action for inverse condemnation differs sharply from that used in a statutory ***expropriation*** proceeding. This Court has recognized the action for inverse condemnation arises out of the self-executing nature of the constitutional command to pay

ust compensation.[114] The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land allegedly taken or damaged in a constitutional sense against a governmental or private entity having the powers of eminent domain where no expropriation has commenced.[115] Where no ***expropriation*** has taken place, Plaintiffs must prove that a "taking" has occurred. They must therefore prove the elements of a taking and overcome the defenses thereto. Plaintiffs have never cited and DNR has never found a case in which a Louisiana Court has applied the statutory law of ***expropriation*** in an inverse condemnation suit, or the law of inverse condemnation to a statutory expropriation proceeding. To do so would directly violate this Honorable Court's recognition of the clear distinction between the two concepts.[116] The Fourth Circuit's original opinion recognized the unique characteristics of each proceeding, and correctly applied the law of inverse condemnation to Plaintiffs' inverse condemnation suit. The Fourth Circuit's final opinion on rehearing did not, and should therefore be reversed.

CONCLUSION

The Fourth Circuit's 3-2 decision has obliterated decades of constitutional law in one fell swoop. Worse still,

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114 State, Through Dept. of Transportation and Development v. Chambers Investment Co., Inc., 595 So.2d 598, 602 (La. 1992). See also Ardoin v. State, through Dept. Of Transportation and Development, 679 So.2d 928 (La. App. 3rd Cir. 1996).

115 Id. at 602.

116 State through Department of Transportation and Development v. Chambers, 91-1202 (La. 3/2/92), 595 So.2d 598, 602.

the Fourth Circuit was unable to cite any controlling authority to support its action. This was because all controlling authority actually runs contrary to every aspect of the Fourth Circuit's ruling.

DNR submits that this Honorable Court should restore the legal landscape to what it was prior to the Fourth Circuit's devastating decision. This will, in turn, allow all levels of Louisiana government to remain functional rather than be forced "to regulate by purchase." DNR will also be able to return to the difficult task of restoring one of Louisiana's most valuable economic resources, its wetlands and coastal areas.

The decision of the Fourth Circuit should be reversed and judgment should be rendered in favor of DNR, dismissing all claims just as in the parallel federal proceedings. Pending this Honorable Court's decision, given the far-reaching impacts of the Fourth Circuit's decision on all aspects of government, DNR respectfully requests a stay of proceedings and expedited consideration.

RESPECTFULLY SUBMITTED,

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In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES
Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENTS, ALBERT J. AVENAL, JR., CLARENCE DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY AND NICK SKANSI

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QUESTION PRESENTED

Is there a compelling reason to grant certiorari in this case to review a Louisiana appellate court decision which refused to apply collateral estoppel on the basis of its construction and application of Louisiana law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT.....4

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases **Page**

Avenal v. State, 757 So.2d 1 (La. App. 4 Cir. 2000) 3,8,9

Avenal v. United States, 100 F.2d 933 (Fed. Cir. 1995).....1

Avenal v. State, 2000-1077 (La. 6/23/00), _So.2d_ 3

Bd. of Commissioners v. Missouri Pacific Railroad, 625 So.2d 1070 (La. App. 4 Cir. 1993), *writs denied*, 630 So.2d 802 (La. 1994), *cert. denied,* 512 U.S. 1220, 114 S.Ct. 2707, 129 L.Ed. 2d 835 (1994).....8,9

Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991) 4

Brister v. A.W.I. Inc., 946 F.2d 350 (5th Cir. 1991).....7

Copeland v. Merrill Lynch & Co., Inc., 47 F.3d 1415 (5th Cir. 1995) 3,6,7

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S.Ct. 1961 (1999).....6

Holland v. State, Dept. of Transp., 554 So.2d 727 (La. App. 2 Cir. 1989) *writs denied,* 559 So.2d 125 (La. 1990) 9

Cases **Page**

In re Southmark Corp., 163 F.3d 925 (5th Cir. 1999), *cert. denied*, __U.S._, 119 S.Ct. 2339 (1999).....7

Nations v. Sun Oil Company, 705 F.2d 742 (5th Cir. 1983) 6,7

McMurtray v. Holladay, 11 F.3d 499 (5th Cir. 1993) 2

Metromedia Co. v. Fugazy, 983 F.2d 350 (2nd Cir. 1993), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L. Ed.2d 662 (1993) 7

Parish of East Baton Rouge v. Landrum, 289 So.2d 21 (La. App. 1 Cir. 1973), *writ denied*, 293 So.2d 176 (La. 1974) 9

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L. Ed.2d. 67 (1984) ...1-2

Peterson v. Clark Leasing Corp., 451 F.2d 1291 (9th Cir. 1971).....7

Recoveredge L.P. v. Pentecost, 44 F.3d 1284 (5th Cir. 1995) 7

Reeder v. Succession of Palmer, 623 So.2d 1268 (La. 1993) 6

Southern Pac Transp. Co. v. Smith Material Corp., 616 F.2d 111(5th Cir. 1980) 8

Cases **Page**

State Through Dept. of Highways v. Vermillion Development Co., 249 So.2d 167 (La. 1971) 8,9

State v. Spooner, 520 So.2d 336 (La. 1988) 10

State v. 1971 Green GMC Van, 354 So.2d 479 (La. 1977) 10

Stone v. Entergy Services, Inc., 744 So.2d 141 (La. App. 4 Cir.), *writ denied*, 750 So.2d 989 (La. 1999) 10

Taylor v. Charter Medical Corp., 162 F.3d 827 (5th Cir. 1998) 7

Terrebonne Fuel & Lube v. Placid Refining Co., 666 So.2d 624 (La.1996) 6

Louisiana Constitutional Articles

Art. 1, Section 4 of the 1974 Louisiana Constitution ...1,7,10

Miscellaneous Texts and References

L. Jenkins, *The Declaration of Rights*, 21 LOY.L.REV. 9 (1975).....10

18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4417.....3,7

STATEMENT OF THE CASE

The plaintiffs/respondents are a class of oyster leaseholders who instituted this inverse condemnation action in Louisiana state court against the State of Louisiana, Department of Natural Resources ("the DNR") under Article I, Section 4 of the 1974 Louisiana constitution.[1] They alleged that the DNR's construction and operation of the Caernarvon freshwater diversion structure affected a "taking" of their oyster leases by diverting freshwater from the Mississippi River into Breton Sound (where their leases are located) and lowering the salinity levels there below that necessary to support oyster cultivation.

After five (5) years of pretrial proceedings, and on the eve of a second trial setting, the DNR asked the lower courts to dismiss this action on collateral estoppel grounds by giving preclusive effect to the Federal Circuit's decision in *Avenal v. United States*, 100 F.2d 933 (Fed. Cir. 1995) - an action under the federal constitution decided some three (3) years earlier, and to which the DNR was not a party.[2] The Federal Circuit in *Avenal* affirmed a summary judgment

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[1] Article I, Section 4 of the 1974 Louisiana Constitution provides, in pertinent part: "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit."

[2] The DNR argues throughout its petition that the leaseholders, through this state court proceeding, are attempting to have "two bites at the apple." This argument lacks merit. The DNR ignores the fact that the leaseholders were required to proceed in two separate forums. The Eleventh Amendment prohibits suits against states or their agencies like the DNR from being heard in federal court, *Pennhurst State School*

dismissal of the leaseholders' claims against the United States, concluding that 1) the leaseholders "knew" in 1965 that the Caernarvon structure would eventually be built, and 2) the leaseholders also "knew" that the Caernarvon structure, once built, would destroy their oyster leases in Breton Sound. The Federal Circuit then held that this "knowledge" about the Caernarvon structure deprived the leaseholders of any reasonable investment-backed interest in their leases, and defeated their claim for compensation.

On the DNR's motion for summary judgment in this case, the trial court refused to give preclusive affect to the Federal Circuit's decision and denied the motion. The DNR sought supervisory review from the Louisiana Court of Appeal, Fourth Circuit which, on rehearing, affirmed the judgment of the trial court. *Avenal v. State*, 757 So.2d 1 (La. App. 4 Cir. 2000).[3] The court on rehearing held that only

(footnote 2 continued)
& Hosp. v. Halderman, 465 U.S. 89, 98, 104 S.Ct. 900, 906, 79 L. Ed.2d. 67 (1984); *McMurtray v. Holladay,* 11 F.3d 499, 504 (5th Cir. 1993) (11th amendment prohibits takings case against state in federal court), and thus the leaseholders could not have joined the DNR as a defendant in their federal suit; they were required to bring this case in Louisiana state court. Similarly, the federal government could not be made a party to this proceeding because the federal government may only be sued in federal court. The leaseholders therefore had no choice but to proceed simultaneously in state and federal forums.

[3] On original hearing, a five-judge panel of the Fourth Circuit reversed the trial court's judgment and ordered the case dismissed. The majority on original hearing consisted of Judges Waltzer, Gulotta and Ciaccio; Chief Judge Klees and Judge McKay dissented. On rehearing, after additional briefing and oral argument, Judge Ciaccio changed his vote, creating a 3-2 majority to affirm the trial court. Judge Ciaccio wrote a separate concurring opinion to explain why he changed his mind on rehearing.

evidence of bad faith on the part of a leaseholder could defeat a claim for compensation in a takings case under Louisiana law. *Avenal,* 757 So.2d at 12. Thus, as Judge Ciaccio explained in his concurring opinion, leaseholder knowledge of a pending expropriation -- which the Federal Circuit held to be fatal to the federal claims -- did not bar claims for compensation under the Louisiana constitution. *Avenal*, 757 So.2d at 13 (Ciaccio, J. concurring). As amplified below, this conclusion is correct because, under the federal law of issue preclusion, collateral estoppel does not preclude litigation of an issue in a subsequent proceeding unless both the facts and the legal standard used to assess them are the same in both proceedings. *Copeland v. Merrill Lynch & Co., Inc.,* 47 F.3d 1415, 1422 (5th Cir. 1995); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* §4417, at 165. Because the Louisiana appellate court concluded that the Louisiana constitution provided a different and more liberal legal standard than the one applied by the Federal Circuit, it correctly held that collateral estoppel did not apply to this state court proceeding.

The Louisiana Supreme Court denied the DNR's application for supervisory review, *Avenal v. State*, 2000-1077 (La. 6/23/00), _So.2d_ , and the DNR then sought certiorari in this court.

SUMMARY OF ARGUMENT

There is no compelling reason to grant the DNR's application for a writ of certiorari in this case because the lower Louisiana court decision turned exclusively on its interpretation and application of Louisiana law. The DNR

sought dismissal of this state takings action on collateral estoppel grounds on the basis of a prior federal court decision. Federal courts have uniformly recognized that issue preclusion in a subsequent matter through collateral estoppel is inapplicable where the legal standard to be applied in the subsequent matter is different than the one in the initial proceeding. The Louisiana appellate court decision at issue correctly held that, under controlling Louisiana expropriation law, a different legal standard applied to this state court proceeding than was applied in the prior federal proceeding. As a result, the petition presents no issue of federal law and certiorari should be denied.

ARGUMENT

A petition for writ of certiorari will be granted only for compelling reasons. Sup. Ct. R. 10. Such reasons typically consist of conflicting decisions of the federal appellate courts on the same important matter, an important question of federal law that has not been but should be settled by this Court, or a lower court decision on a federal question that conflicts with relevant decisions of this Court. Sup. Ct. R 10 (a) & (c). A principal purpose of certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of federal law. *Braxton v. United States,* 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed. 2d 385 (1991). Under these standards, the DNR's petition for a writ of certiorari should be denied because it seeks review of a state appellate court decision applying well-settled principles of state law.

In an effort to suggest otherwise, the DNR's petition

in this court dramatically misrepresents the holding of the Louisiana Fourth Circuit. The DNR contends that the Louisiana Fourth Circuit "ruled that collateral estoppel, whether based on federal common law or any other source of law, would simply not apply in Louisiana." See Petition for Writ of Certiorari, p. 9. The DNR thus alleges that the Louisiana appellate court deliberately failed to consider the applicability of collateral estoppel. This is plainly not correct. Both Judge McKay's majority opinion on rehearing, and Judge Ciaccio's concurring opinion on rehearing explaining why he changed his vote, make clear that their decision was grounded on the conclusion that Louisiana law provided a different legal standard in takings cases than the legal standard utilized by the Federal Circuit. The DNR's contention that the Louisiana Fourth Circuit majority failed to consider whether the Federal Circuit's decision should be given preclusive effect is therefore flatly wrong. The court considered whether collateral estoppel should apply, and expressly concluded that it did not because of the different legal standard provided by state law.

The DNR also attempts to prompt a grant of certiorari in this case by couching its collateral estoppel arguments as ones involving constitutional violations. More specifically, the petitioner raises for the first time in this court the constitutional issues of the Full Faith and Credit clause and the Supremacy clause. See Petition for Writ of Certiorari, p. i.[4]

4 In the "Question Presented" section, the DNR also suggests that the Louisiana appellate court refused to even recognize the preclusive effect of a federal judgment. As noted above, the Louisiana Fourth Circuit did not refuse to consider the preclusive effect of the Federal Court's decision. The court instead considered whether the same legal standard applied and, finding that different standards applied, held collateral estoppel inapplicable.

In the lower courts, however, the DNR never raised these constitutional issues but merely moved for the application of collateral estoppel. This is a significant difference, amounting to a wholly new issue raised the first time in this court. Far from reaching the lofty dimensions of a constitutional violation, collateral estoppel is an equitable doctrine. *Nations v. Sun Oil Company*, 705 F.2d 742, 745 (5th Cir. 1983). Federal courts have long recognized that trial courts have broad discretion in deciding whether to apply collateral estoppel. *Copeland, supra*, 47 F.3d at 1415; *Nations*, 705 F.2d at 744; trial courts have no discretion with respect to constitutional provisions. Whereas the DNR in the Louisiana courts sought the benefit of a discretionary equitable doctrine, it argues in this court that it has been the victim of a constitutional violation. It is well-settled that this court will not consider arguments neither raised nor considered in the lower courts, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 119 S.Ct. 1961, 1968 n. 3 (1999), and this court should therefore disregard the DNR's constitutional arguments and instead consider only whether the lower courts committed an abuse of discretion in refusing to apply collateral estoppel.

The Louisiana Fourth Circuit correctly concluded on rehearing that collateral estoppel did not apply to this case. Louisiana law recognizes that when, as here, a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of *res judicata* that must be applied. *Terrebonne Fuel & Lube v. Placid Refining Co.*, 666 So.2d 624, 632-3 (La. 1996); *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). This case

involves not *res judicata*, which the federal Fifth Circuit has recognized as a "doctrine of legal right," *Nations, supra,* 705 F.2d at 744, but collateral estoppel.

Federal courts applying collateral estoppel have held that it may be applied to bar the relitigation of a claim, previously decided in another court, "when - but only when - the facts and ***the legal standard used to assess the facts are the same*** in both proceedings." *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 832 (5th Cir. 1998) (emphasis added); see also *In re Southmark Corp.*, 163 F.3d 925, 932 (5th Cir. 1999), *cert. denied*, _U.S._, 119 S.Ct. 2339 (1999); *Copeland, supra*, 47 F.3d at 1422; *Recoveredge L.P. v. Pentecost,* 44 F.3d 1284, 1291 (5th Cir. 1995); *Metromedia Co. v. Fugazy,* 983 F.2d 350, 365 (2nd Cir. 1993), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L. Ed.2d 662 (1993); *Brister v. A. W.I. Inc.,* 946 F.2d 350,354 n.1 (5th Cir. 1991); *Southern Pac Transp. Co. v. Smith Material Corp.,* 616 F.2d 111, 115 (5th Cir. 1980); *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971). As one leading treatise points out, "[c]ourts have readily perceived that for purposes of preclusion, issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, §4417, at 165. The foregoing authorities make it abundantly clear that collateral estoppel does not apply when a different legal standard is applicable in the second proceeding.

The issue before the Louisiana Fourth Circuit, therefore, was whether a different legal standard applied to the leaseholders' claims under Article I, Section 4 of the 1974

Louisiana constitution than was applied by the Federal Circuit under the federal constitution. The Fourth Circuit majority on rehearing expressly acknowledged that this was the determinative issue, stating:

"The question central to our analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law and if so whether the plaintiffs' action is barred by collateral estoppel." *Avenal, supra*, 757 So.2d at 10-11.[5] The answer to this "central" question required the Fourth Circuit to construe and apply Louisiana takings law. The court found that a different legal standard applied under Louisiana law, and explicitly rejected the "reasonable investment-backed expectation" test utilized by the Federal Circuit. *Avenal*, 757 So.2d at 12.

The Louisiana Fourth Circuit also concluded that a different legal standard applied under Louisiana law with respect to the issue of leaseholder knowledge. It has long been the law in Louisiana that a leaseholder's knowledge of a pending expropriation did not defeat his claim for compensation unless the leaseholder was guilty of predatory conduct or bad faith. *State Through Dept. of Highways v. Vermillion Development Co.*, 249 So.2d 167, 171 (La. 1971); *Bd. of Commissioners v. Missouri Pacific Railroad*, 625 So.2d 1070, 1076-78 (La. App. 4 Cir. 1993), *writs denied*, 630 So.2d 802-3 (La. 1994), *cert. denied*, 512 U.S.

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[5] The DNR contends that the Fourth Circuit majority refused to even consider the applicability of collateral estoppel. It is clear that, far from ignoring the question, the Fourth Circuit majority addressed it head on and concluded that collateral estoppel did not apply because a different legal standard applied under Louisiana law.

1220, 114 S.Ct. 2707, 129 L.Ed. 2d 835 (1994); *Holland v. State, Dept. of Transp.*, 554 So.2d 727, 732 (La. App. 2 Cir. 1989), *writs denied*, 559 So.2d 125 (La. 1990); *Parish of East Baton Rouge v. Landrum,* 289 So.2d 215, 217 (La. App. 1 Cir. 1973), *writ denied* 293 So.2d 176 (La. 1974). The Fourth Circuit on rehearing relied on this line of cases in holding that collateral estoppel did not apply. *Avenal, supra*, 757 So.2d at 12.

Judge Ciaccio amplified on the court's decision on rehearing in his concurring opinion, where he wrote:

> I voted to grant a rehearing because my review of our earlier opinion disclosed errors of law that had lead to an erroneous judgment.
>
> ***
>
> In the case of *State, Department of Transportation and Development v. Vermillion Development Co.*, 249 So.2d 167, 258 La. 1159 (La. 1971), our Supreme Court enunciated the principle that knowledge of an anticipated expropriation does not bar a claim for compensation by a lessee of the property in the absence of proof of bad faith, fraudulent or predatory conduct. This rule of law has been uniformly followed in the cases cited in the majority opinion together with the case of *Board of Commissioners v. Missouri Pacific Railroad,* 625 So.2d 1070, 1076-78, (La. App. 4 Cir. 1993), *writs denied,* 630 So.2d 802-3 (La. 1994).
>
> The crux of the dismissal of plaintiff's suit in the Federal Court was the finding that plaintiffs *knowledge* of the pending action of the Corps of Engineers

> and the State of Louisiana prevented them from having a "reasonable investment backed expectation that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal government." **But *prior knowledge* of an anticipated expropriation is not a bar to compensation under Louisiana law.**

Avenal, 757 So.2d at 12-13 (Ciaccio, J., concurring). (emphasis added). As Judge Ciaccio noted, the Louisiana legal standard on this issue is more liberal than the one applied by the Federal Circuit. This conclusion is consistent with prior Louisiana Supreme Court decisions which recognized that Article I, Section 4 of the 1974 Louisiana constitution was intended to give far-reaching new protection to the rights of Louisiana citizens to own and control property. *State v. 1971 Green GMC Van*, 354 So.2d 479, 486 (La. 1977); *State v. Spooner*, 520 So.2d 336, 345 (La. 1988). Its language goes beyond other state constitutions and the federal constitution in limiting the power of government to regulate private property. *1971 Green GMC Van, supra*; L. Jenkins, *The Declaration of Rights*, 21 LOY.L.REV. 9, 19 (1975).[6]

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[6] The DNR's claim that the Fourth Circuit decision on rehearing conflicts with other Louisiana Fourth Circuit decisions – specifically, *Stone v. Entergy Services, Inc.*, 744 So.2d 141 (La. App. 4 Cir.), writ denied, 750 So.2d 989 (La. 1999) – is palpably incorrect. In *Stone*, the Fourth Circuit held that a prior federal judgment did not preclude a subsequent state court suit between the same parties because the federal judge expressly stated that the state claim would have to be decided in state court. 744 So.2d at 143. *Stone* is fully consistent with the Fourth Circuit's decision on rehearing in this case, which also refused to preclude a subsequent state court suit, and both opinions were authored by Judge McKay.

It is therefore clear that the Louisiana Fourth Circuit majority refused on rehearing to apply collateral estoppel on the basis of its construction of Louisiana law. Its conclusion that the Louisiana legal standard was different than the standard applied by the Federal Circuit precludes collateral estoppel under federal precedents. The DNR's petition therefore raises no federal issue.

CONCLUSION

The DNR asks this court to review a Louisiana appellate court's interpretation of Louisiana law. Under Rule 10 of this Court, there is no compelling reason for granting certiorari and the DNR's petition should be denied.

DATE: 10/19/00

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